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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 359

SEATTLE GAS COMPANY, APPELLANT,

vs.

THE CITY OF SEATTLE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED AUGUST 18, 1933

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from superior court of King County	1	1
Amended complaint	1	1
Exhibit "B"—Application for license under protest.	21	17
Exhibit "A"—Ordinance providing for a license or occupation tax	26	21
Demurrer	40	33
Judgment	41	33
Order allowing appeal	42	34
Bond on appeal (omitted in printing)	43	
Clerk's certificate (omitted in printing)	45	
Proceedings in supreme court of Washington	46	35
Opinion, Blake, J., in case of Puget Sound Power & Light Co. vs. City of Seattle	46	35
Dissenting opinion, Steinert, J	53	42
Opinion, Blake, J., in case of Pacific T. & T. Co. vs. City of Seattle	57	45
Dissenting opinion, Steinert, J	65	53
Opinion per curiam	73	59
Dissenting opinion, Steinert, J	74	59
Order denying petition for rehearing	75	60
Judgment	76	60

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1933

	Original	Print
Petition for appeal, assignments of error, and prayer for reversal	77	61
Order allowing appeal	90	64
Supersedeas bond on appeal.....(omitted in printing)..	92	
Citation and service.....(omitted in printing)..	94	
Acknowledgment of service	96	65
Praecipe for transcript of record	97	66
Clerk's certificate.....(omitted in printing)..	99	
Statement of points to be relied upon and designation as to record	100	67

[fols. a & 1]

IN SUPERIOR COURT OF KING COUNTY

No. 355,177

SEATTLE GAS COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, Defendant

AMENDED COMPLAINT—Filed Oct. 3, 1932

Comes now the plaintiff and with permission of the court files its amended complaint, and for its first cause of action against defendant alleges:

I

That at all the times herein mentioned since 1904 the plaintiff has been and now is a corporation organized and existing under and by virtue of the laws of the State of Washington and engaged and authorized to engage in the business of manufacturing and supplying the inhabitants of the City of Seattle and the inhabitants of certain portions of King County, Washington, with gas for illuminating, cooking and heating purposes, and had and has its main office and principal place of business in said City of Seattle and has paid its annual license fee and all other fees required to be paid by plaintiff under the laws of the State of Washington.

II

That the defendant, the City of Seattle, is a municipal corporation organized and existing as a city of the first class under and by virtue of the laws of the State of Washington and a special charter which was adopted by it pursuant to such laws at the general election held March 3, 1896, and amended from time to time at general elections during succeeding years; that as such municipal corporation at all times herein mentioned defendant, in a proprietary capacity, has been and now is engaged in the business of [fol. 2] selling and furnishing electric light and power to the public for hire within the corporate limits of the City of Seattle, and has been and now is engaged in direct and ac-

tive competition with plaintiff in that the defendant sells electricity for heating, fuel and illuminating purposes and for divers and different other purposes, for all of which the plaintiff has and now sells gas as it is authorized to do under its franchise granted by the defendant and hereinafter more particularly described.

III

That under the laws of the State of Washington defendant has sole and exclusive power to fix and determine the rates at which it will sell electric light and power to its customers and the rules, regulations and practices which it desires to follow in its said proprietary business of selling said electric light and power to the public; that with respect to its rates, rules, regulations and practices, defendant is not in any respect regulated by the State of Washington or its Department of Public Works; that under the laws of the State of Washington the property of defendant used by it in its business of so supplying the public with electricity is exempt from property taxes for city, county or state purposes and that defendant is not required to pay and does not pay such taxes.

IV

That plaintiff under the laws of the State of Washington Remington's Compiled Statutes, Section 10362, is subject to the exclusive jurisdiction and regulation of the Department of Public Works of the State of Washington as to the rates which it may charge its customers and as to the rules, regulations and practices to be followed by it in the conduct of its business; that with respect to plaintiff's rates, rules, regulations and practices, the defendant has no lawful power of supervision, control or regulation; that under the laws of the State of Washington plaintiff is required to pay [fol. 3] and does pay annual taxes for state, county and city purposes upon all of its property (including its franchises hereinafter described, granted by defendant), used in its business in the amount of many thousands of dollars.

V

That defendant at all times herein mentioned has been and is actively engaged in soliciting customers, actual or

potential, of the plaintiff to cease the use and purchase of gas from plaintiff and to substitute therefor electricity produced and sold by the defendant; that by reason thereof plaintiff, in order to retain its customers, is obliged to sell and supply more heat units at a given price than are supplied by the defendant to the public for the same price.

VI

That defendant for hire in its propri-tary capacity annually sells to defendant in its governmental capacity all of the electric light and power used by defendant for lighting its public streets and other municipal purposes; that the price paid by defendant to itself for such electrical energy is arbitrarily fixed and determined by defendant regardless of the market value of same and regardless of the price at which defendant could secure same in the open market; that to pay itself for such electrical energy money, in the amount thus determined by defendant as the price to be paid for same, is transferred by defendant from its General Fund to its City Light Fund, which is the fund of defendant into which is paid all gross revenues receievd by defendant from its propri-tary business of selling electric light and power to the public for hire; that the gross revenues of defendant's said proprietary business are annually increased in the amount of several hundred thousand dollars by such payments from defendant's General Fund, the amount of such increase for the year 1932 being in excess of the sum of $438,750.

[fol. 4] VII

That plaintiff is and was at all the time and times herein mentioned the lawful owner and holder of a franchise commonly called the "Dexter Horton Franchise", which was granted by defendant, The City of Seattle, to plaintiff's predecessors in interest by an ordinance known as Ordinance No. 39, as amended by Ordinance No. 234, which said Ordinance No. 234 is entitled:

"An ordinance amending Ordinance No. 39 entitled 'An Ordinance authorizing and empowering Dexter Horton, A. A. Denny, John Collins, and Charles E. Burrows, and their associates, assigns, successors or executors, to erect and maintain Gas Works and to lay down pipe for the

supply and distribution of Illuminating Gas in the City of Seattle, Washington Territory.' Approved February 12, 1881."

And is also the lawful owner and holder of a franchise known as the "Malone Franchise", which was granted to plaintiff's predecessors by the defendant, being Ordinance No. 6968, which said Ordinance No. 6968 is entitled as follows, to-wit:

"An ordinance granting to R. H. Malone, his heirs, associates, successors and assigns, the right, privilege and authority to erect and maintain Gas Works and to lay down, maintain and operate pipes in the streets, alleys and public places in the City of Seattle, for the transmission, supply, distribution and sale of heating and illuminating gas. Approved June 11, 1901."

which said ordinance was amended in certain immaterial respects by Ordinance No. 7735.

That under each of said franchises and upon the faith thereof, and each of them, the plaintiff has constantly, continuously and without interruption since its organization in the year 1904 manufactured and sold gas to the inhabitants of the City of Seattle and to the inhabitants of certain portions of King County, Washington, for illuminating, heating, manufacturing and many other purposes, for which the defendant sells electricity, in strict and keen competition with the defendant and by and with the consent of the defendant in its governmental as distinguished from its [fol. 5] proprietary capacity.

That by reason of the facts herein alleged defendant has granted plaintiff full authority and a license to engage in its business of furnishing and selling gas for heating, cooking and other purposes within the corporate limits of the City of Seattle until March 14, 1952; that defendant may not now impair or burden such grant and/or such authority by requiring the plaintiff to secure from defendant the additional license to engage in such business, which defendant by its ordinance hereinafter set forth is asserting the right to require plaintiff to secure.

VIII

That the defendant commenced the business of selling electric light and power to the public for hire on or about

January 31, 1902, when its City Council passed an ordinance known as Ordinance No. 7708, entitled:

"An ordinance specifying and adopting the plan proposed by the City of Seattle for the acquiring for the city by purchase or construction, or both, a plant and system for furnishing light or power, or both, for corporate or individual uses, or both such uses, declaring the estimated cost thereof as near as may be, authorizing an indebtedness therefor, and submitting the same for ratification or rejection to the qualified voters of said city at the general election to be held on March 4, 1902."

passed by the City Council on January 31, 1902, and approved by the Mayor on January 31, 1902; said ordinance was ratified at a general election held on March 4, 1902; that in said ordinance provision was made for an issue of general lien bonds in the amount of $590,000.00, the proceeds from the sale of which were to be used in the purchase or construction of a plant or system for furnishing light and power to the public for hire; that thereafter from time to time other general lien bonds for extensions to the electric lighting and power facilities of the defendant were authorized and issued; that of such general lien bonds [fol. 6] there are now and on December 31, 1931, were outstanding bonds in the total principal amount of approximately $1,447,000.00.

IX

That in addition to such general lien bonds defendant has financed the acquisition, construction and development of its electric lighting and power system by the issuance of revenue bonds, the first of which were authorized and issued in the year 1917; that the total principal amount of such revenue bonds which are now and on December 31, 1931, were outstanding, is approximately $32,852,000.00; that such revenue bonds have all been authorized and issued by ordinance enacted pursuant to the authority vested in defendant to do so by an act of the Legislature of the State of Washington, which is Section 9491 of Remington's Compiled Statutes; that such revenue bonds are obligations against only the gross revenues received by the defendant from the sale of electric light and power to the public, which gross revenues are by law and the provisions of each of

said ordinances and by the terms and conditions of each of said bonds pledged to the payment of the principal of said bonds and any interest due thereon; that such pledge constitutes a charge upon such gross revenues "prior and superior to all other charges whatsoever, including charges for maintenance and operation."

X

That under Article VIII, Section 9, of the Charter of the City of Seattle, as amended March 4, 1913, all revenues due to The City of Seattle for electric light and power sold by it must be collected by the City Treasurer, who is required to keep said revenues in a separate fund, designated "City Light Fund"; that by virtue of Article IX, Section 17, of said charter "no transfer shall be made from one fund to another except as otherwise provided in this charter, unless by an affirmative vote of a majority of the members elected of the City Council by ayes and noes recorded in the journal of proceedings"; that there is no [fol. 7] other provision in said charter providing for the transfer of money from the Department of Lighting fund to the general fund of the City of Seattle; that under Article IX, Section 6, of the Charter of The City of Seattle it is required of the City Treasurer that "he shall not pay out any moneys belonging to the city except upon legal demands allowed and audited in the manner prescribed by this charter or by law"; that under Article IX, Section 7, of said Charter, the duties of the City Treasurer are specified as follows:

"It shall be the duty of the City Treasurer to receipt for the moneys of the city and to pay out the same only on warrants drawn in pursuance of the order of the City Council and signed and registered by the City Comptroller."

XI

That pursuant to the law of the State of Washington, Remington's Compiled Statutes, Section 9000, defendant, on October 5, 1931, adopted its budget of expenses and revenues for the year 1932; that under said law "each and every city official and employe" in making expenditures and in the incurring of liabilities, is limited "to the amounts of such detailed budget"; that in said budget no

provision is made for payment of any license fee or tax by defendant out of the revenues of its Department of Lighting or other revenues; that under said law of the State of Washington and said budget no such payment may lawfully be made by defendant for or during the year 1932.

XII

That on the 23rd day of May, 1932, the City Council of defendant, The City of Seattle, in the exercise of a claimed governmental power and authority to do so, passed an ordinance known as Ordinance No. 62662 and/or No. 62662 as amended, which was approved by the Acting Mayor of said City on May 25, 1932, was on said date filed by the City Comptroller and ex-officio City Clerk, and, on May 31, 1932, was duly published, which ordinance is entitled:

[fol. 8] "An Ordinance relating to and providing for a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties."

That a copy of said Ordinance is attached hereto, marked Exhibit "A", and by this reference made a part hereof; that defendant claims and asserts that said ordinance is in all respects a valid law and ordinance of The City of Seattle and that plaintiff is legally and validly thereby required to apply for the license, to file the return of its "gross income", and to pay the license fee or tax as provided in said ordinance, and that in default thereof plaintiff will be subject to the penalties therein specified.

XIII

That under duress and coercion, by reason of the penalties provided in said Ordinance No. 62662 and/or No. 62662 as amended and to enable plaintiff in a lawful manner to lawfully contest the validity of said ordinance and the right of defendant to exact the license fee or tax therein provided, plaintiff, on July 1, 1932, under protest, a copy of which is attached hereto and marked Exhibit "B", paid the defendant an initial installment of $1,000.00 and applied for the license specified in said ordinance, and thereafter and on or about July 11, 1932, although uncertain as to

the meaning of "gross income" as defined in said ordinance, and although unable to determine the manner by which said "gross income" as therein defined could be ascertained and the amount of tax the plaintiff was required to pay thereunder, nevertheless made a return in which it atte-pted to show its "gross income" as defined by said ordinance, and also, under protest, paid defendant the further sum of $4,500.66 as the balance of the first monthly installment of the tax sought to be imposed by said ordinance and which would be due to defendant if said ordinance were valid and enforcible as against plaintiff and if it were possible to compute the "gross income" as defined in said ordinance, and the amount of tax payable [fol. 9] under said ordinance; that the protest under which said second payment was made is identical with the protest under which said initial payment of $1,000.00 was made, save as to the amount paid and the date thereof; that plaintiff, contending that said ordinance is invalid and unenforcible as to it, brings this action for the purpose of recovering from the defendant the sums so paid under protest, as in this paragraph set forth.

XIV

That by said Ordinance No. 62662 and/or No. 62662 as amended, defendant is not required to pay the license fee or tax therein specified out of revenues received by defendant from the sale of electrical energy which in its proprietary capacity in competition with plaintiff defendant furnishes and sells to the public for hire; nor is defendant by said ordinance required to pay such license fee or tax at all; and that said ordinance is in no respect enforcible against defendant and in no respect imposes said license fee or tax upon defendant.

XV

That in truth and in fact defendant has not paid the license fee or tax specified in said ordinance or any part thereof; and upon information and belief based upon the form in which said ordinance was enacted as hereinbefore alleged and the failure of defendant to pay said license fee or tax, plaintiff alleges that defendant does not intend to

pay and will not pay said license fee or tax or any part thereof, and has no legal authority to pay the same.

XVI

That regardless of the good or bad faith of defendant in the enactment of said ordinance, regardless of defendant's assertion of a willingness to cause money received by it from the sale of electrical energy for hire to be transferred to its general fund, and regardless of any assertion by defendant of its intention to make such a transfer, even [fol. 10] though the said ordinance does not require defendant so to do, plaintiff asserts that under the facts as herein alleged defendant by the enactment of said ordinance is in truth and in fact unlawfully exercising its asserted governmental power of taxation in aid of its proprietary business of selling and furnishing electrical energy to the public for hire; that under the facts herein alleged the exercise of such governmental power of taxation by defendant against plaintiff, its competitor, as defendant by said ordinance is asserting the right to exercise same, will enable defendant as prosecutor, jury, judge and executioner to annihilate plaintiff's business to the benefit of defendant's proprietary competing business; that to permit defendant by the exercise of such asserted governmental power of taxation to extract such a portion of plaintiff's gross income as defendant may designate, and/or as defendant in said ordinance has designated, which gross income is definitely limited by defendant's competition with plaintiff, as herein alleged, will deprive plaintiff of its property without due process of law, and will deny plaintiff equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article L, Section 16, of the Constitution of the State of Washington, and will constitute a taking of plaintiff's property for a public purpose without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States; that as to plaintiff any exercise of such power by defendant is and can only be unjust, unfair, unreasonable, inequitable and discriminatory; that defendant by reason of its competition with plaintiff and the facts herein alleged, is as to plaintiff estopped from any such exercise of such asserted or pretended governmental power of taxation.

XVII

That the State of Washington by virtue of Chapter 107 of its laws of 1929 annually collects from plaintiff, and [fol. 11] plaintiff since the enactment thereof has annually paid to the State of Washington one-tenth of one per cent of the gross operating revenue received by plaintiff from its business of selling and furnishing gas to the State of Washington, including the City of Seattle.

XVIII

That by the enactment and enforcement of Chapter 107 of its Laws of 1929, as alleged in Paragraph XVII hereof, the State of Washington has occupied the field of levying an excise tax upon the business of plaintiff and/or of levying a license tax upon plaintiff for revenue purposes, and has thereby excluded defendant from said field of taxation, and has thereby taken from defendant all power and authority, if any it had prior thereto, to exact of plaintiff a license fee for revenue purposes and/or an occupation tax.

XIX

That continuously since July 1, 1932, the rates charged by defendant and the rates now charged by it for the electric light and power which it sells to the public for hire are in no respect greater than were the rates charged by defendant for same prior to July 1, 1932, and prior to the enactment of *of* said Ordinance No. 62662 and/or 62662 as amended.

XX

That as to plaintiff said Ordinance No. 62662 and/or No. 62662 as amended is invalid, unlawful and unenforcible for the following reasons:

(1) Because the City of Seattle and its Council are and were without authority to enact said ordinance or to impose the tax upon protestant provided in said ordinance and/or to enforce said ordinance.

(2) Because said Ordinance is unfair, discriminatory and invalid and without warrant or authority in law.

[fol. 12] (3) Because said Ordinance and the enforcement thereof would deprive protestant of its property and

property rights without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(4) Because said Ordinance and the enforcement thereof would take protestant's private property for public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 16, of the Constitution of the State of Washington.

(5) Because said Ordinance and the enforcement of its terms would deny protestant equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

(6) Because said Ordinance illegally seeks to impose upon the protestant additional unjust obligations which violate the terms of its several franchises thereby impairing said franchises in contravention of Article I, Section 10, of the Constitution of the United States.

(7) Because said Ordinance and the enforcement of its terms would take from protestant the property rights and privileges enjoyed by protestant under its franchises, without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 3, of the Constitution of the State of Washington.

(8) Because the tax sought to be imposed by said Ordinance is so discriminatory, unjust and unfair and so unreasonably high that its enforcement would bring about the confiscation of protestant's property in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States of America.

[fol. 13] (9) Because this protestant and the City Light Department are in direct, keen and active competition, notwithstanding which said Ordinance discriminates against protestant in favor of said City Light Department, in that it does not require payment of said tax by the City of Seattle out of revenues received by it from its Lighting Department and provides no valid or other method whereby the tax ostensibly imposed upon the City Light Depart-

ment can be enforced or collected and to that extent is ineffective and wholly null and void in that both in fact and in law it exempts the city's competing utility from payment of said tax, and further because the prior pledge of the gross revenues received by the City of Seattle from the sale of electric light and power to the payment of the revenue bonds of the City deprives the City of Seattle of any lawful right to divert from such gross revenues the amount of money necessary to enable the city to pay the fee or tax which the Ordinance ostensibly requires the city to pay, and further because under the Seattle budget for 1932 any attempt by any officer or employee of the City of Seattle to pay said tax for the year 1932 out of revenues of its lighting department would be in violation of the law of the State of Washington, and while the Ordinance and the enforcement thereof as to protestant would require actual payment by it of the fee or tax provided therein, the City of Seattle as to its similar competing utility business owned and operated by it in its proprietary capacity is in fact and in law and by the terms of said ordinance exempt from payment of said fee or tax; that such classification is discriminatory, arbitrary, unreasonable, unreal, unfair and unlawful, and in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(10) Because said Ordinance is an illegal attempt by the City of Seattle to regulate the rates, charges, business and operations of this protestant, in violation of the laws of [fol. 14] the State of Washington delegating such authority solely and exclusively to the Department of Public Works of the State of Washington and is an illegal attempt by said City to usurp the functions and powers of said Department.

(11) Because said Ordinance unlawfully seeks to compel this protestant, upon penalty of fine and/or imprisonment, or both, to pay said tax and to obtain a new and additional license to carry on its business as a condition precedent to the exercise of the precise rights and privileges granted by its franchises.

(12) Because protestant's property is coupled with a public interest and it is obligated to serve the citizens of

Seattle uninterruptedly and to give to each class of customers the same measure of service for the same measure of money, and is without authority to discontinue such service independently of whether the license specified in said Ordinance is granted or withheld.

(13) Because the license fee or tax provided by said Ordinance is not levied in pursuance of law as required by Article VII, Section 5 of the Constitution of the State of Washington.

(14) Because the license fee or tax provided by said Ordinance is not uniform in respect to persons and property within the jurisdiction of the City of Seattle as required by Article VII, Section 9, of the Constitution of the State of Washington.

(15) Because the method of appeal and review provided in said Ordinance is indefinite, inadequate, unfair and unlawful in that it denies to protestant the right to *be* a fair and impartial review of the determination of the City Council of the City of Seattle as to the amount of the tax protestant may be required to pay, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

[fol. 15] (16) Because the Ordinance, and particularly section 2 thereof, in which the term "gross income" is defined, is vague, indefinite and uncertain with respect to the amount of the tax to be paid and the manner by which the amount may be ascertained, to an extent that the taxpayer may not without litigation determine with any degree of certainty the amount of the tax he would owe, and is, therefore, invalid and unenforceable, even though the ordinance were not otherwise invalid.

(17) That the State of Washington by the enactment of Chapter 107 of its laws of 1929 and Chapter 107 of its laws of 1923, requiring each public utility corporation engaged in business in the State of Washington to pay a fee of one-tenth of one per cent, of its gross operating revenue, which plaintiff has paid and is now paying, has entered upon the field of levying an excise tax upon the carrying on of the business of the plaintiff, thereby precluding and excluding the defendant from exacting from plaintiff the license fee or tax sought to be imposed by said ordinance

and said ordinance is in conflict with and contravenes said Chapter 107 of the Laws of 1929.

(18) That by the enactment and enforcement of Chapter 107 of its laws of 1929 as alleged in Paragraph XVI hereof, the State of Washington has occupied the field of levying an excise tax upon the business of plaintiff and/or of levying a license tax upon plaintiff for revenue purposes, and has thereby excluded defendant from said field of taxation, and has thereby taken from defendant all power and authority, if any it had prior thereto, to exact of plaintiff a license fee for revenue purposes and/or an occupation tax. That in its operation and effect said ordinance, if enforced as to plaintiff, will enable defendant to annihilate plaintiff's business and will deprive plaintiff of its property without due process of law, and will constitute unlawful, unfair, unjust, unreasonable and confiscatory competition, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Sec- [fol. 16] tion 3, of the Constitution of the State of Washington, and will constitute an unlawful taking of plaintiff's property by the exercise of an asserted governmental power without just compensation, in contravention of the Fifth Amendment to the Contsitution of the United States and Article I, Section 16 of the Constitution of the State of Washington.

Wherefore, under its first cause of action this plaintiff prays judgment against said defendant in the sum of $5,500.66, together with interest upon the sum of $1,000.00 at the rate of 6% per annum from July 1, 1932, and upon the further sum of $4,500.66 at said rate of interest from July 11, 1932, until paid and for its costs and disbursements herein and for general relief.

For its second cause of action against defendant, plaintiff alleges:

I

Plaintiff incorporates in this its second cause of action against the defendant each and every allegation contained in Paragraphs I to XIV, both inclusive, of its first cause of action in all respects, as though each of said allegations contained in said paragraphs were specifically set forth herein.

II

That defendant unlawfully claims and asserts that under said ordinance plaintiff is required to pay to defendant on or before the 10th day of August, 1932, an additional amount of at least $5,500.66, as the second monthly installment of the license fee or tax that would be due from plaintiff if said ordinance were valid and enforceable as to plaintiff, and that plaintiff is required to pay at least a like amount on or before the 10th day of each succeeding month during the balance of the license tax year specified [fol. 17] in said ordinance and that upon failure to make such payments, plaintiff will be subjected to the penalties specified in the ordinance, which defendant threatens to enforce against plaintiff if said sums, or such larger sums as defendant may subsequently claim to be due by plaintiff under said ordinance are not promptly and punctually paid.

III

That the general fund of defendant is now heavily overdrawn and that the banks in the City of Seattle have since May, 1932, refused to cash or accept any and all warrants on said fund; that warrants drawn on said fund cannot be cashed; that if plaintiff continues to pay said monthly installments of said license fee or tax, and the said ordinance is declared to be void, invalid and unconstitutional as contended by plaintiff, the time of repayment thereof to plaintiff by defendant is wholly conjectural and uncertain.

IV

That should plaintiff pay such illegal fees or taxes pursuant to the terms of said ordinance, and be compelled to resort to suit to recover same from defendant, plaintiff's remedy would be neither timely, adequate nor complete; that plaintiff would be thereby caused to suffer an irreparable injury, and be thereby compelled to resort to a multiplicity of suits and prolonged litigation in order to obtain any relief from such unlawful taxation.

V

That should plaintiff refuse to make payment of said monthly installments of said license fee or tax plaintiff will be subject:

(1) To heavy, unlawful, oppressive and confiscatory penalties in addition to such license fee or tax, which penalties are in themselves violative of the "due process" and [fol. 18] "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States, penalties which are of such a nature that the threat of same entitles plaintiff to injunctive relief.

(2) To being deprived of the right to exercise the corporate powers granted plaintiff by its articles of incorporation issued by the State of Washington, and the license granted plaintiff by the State of Washington and the franchises granted plaintiff by defendant;

(3) To being illegally deprived of its lawful right to continue in business as public utility business in the City of Seattle;

(4) To being denied the opportunity to perform its lawful duty as a public utility company which is required by the laws of the State of Washington and by the common law to continuously serve the public;

(5) And to being subjected to many suits and actions if it fails in its duty to supply the public with gas when such service is required.

VI

That if said ordinance is finally adjudged to be lawful and valid, the plaintiff will promptly pay such license fee or tax as is finally adjudged to be due and payable by plaintiff thereunder.

VII

That by reason of the facts herein alleged, plaintiff has no adequate remedy except in the court of equity, and unless equitable relief by injunction, temporary and permanent, is granted by this Court, plaintiff will be deprived of its lawful rights, as herein set forth.

Wherefore, under its second cause of action, plaintiff prays a judgment and decree of this Court as follows:

[fol. 19] 1. That defendant, its officers, agents and employees be forever enjoined and restrained from enforcing as against plaintiff the said Ordinance No. 62662 and/or No. 62662, as amended, or any portion thereof.

2. That pending the determination of this suit defendant, its officers, agents and employees be temporarily enjoined and restrained from enforcing as against this plaintiff the said Ordinance No. 62662 and/or No. 62662 as amended, or any portion thereof, and that defendant be required to show cause on a day certain to be fixed by this court why such temporary injunction should not be granted as herein prayed.

3. That plaintiff do have and recover its costs and disbursements herein.

4. That plaintiff have such other and further relief as to the Court may seem just and proper.

Poe, Falknor, Falknor & Emory, Attorneys for Plaintiff.

Office & P. O. Address: 977 Dexter Horton Bldg., Seattle, Washington.

Duly sworn to by James F. Pollard. Jurat omitted in printing.

[fol. 20] Copy of foregoing Amended Complaint received Sept. 30, 1932.

A. C. Van Soelen, Corp. Counsel. Walter L. Baumgartner, Assistant.

[File endorsement omitted.]

[fol. 21] EXHIBIT "B" TO AMENDED COMPLAINT

To the City of Seattle, a municipal corporation; the Honorable City Council of the City of Seattle; Harry W. Carroll, Esq., Comptroller of the City of Seattle, and H. L. Collier, Esq., Treasurer of the City of Seattle:

Comes now Seattle Gas Company, a Washington corporation, and under protest files the return and makes application for the so-called Occupation License required by Ordinance No. 62662 of the City of Seattle and/or No. 62662 as amended, and further under protest pays here-

with the sum of $1,000.00 as a first installment of the tax imposed by said Ordinance.

The specific grounds upon which the Seattle Gas Company protests and objects are hereinafter set forth and you are hereby notified that it will institute an appropriate suit or action to test the validity of said ordinance and the right of the City of Seattle to require said report and license and to impose said tax and also to recover said tax with interest.

The specific grounds upon which the Seattle Gas Company protests are:

1. Because the City of Seattle and its Council are and were without authority to enact said ordinance or to impose the tax upon protestant provided in said ordinance and/or to enforce said ordinance.

2. Because said Ordinance is unfair, discriminatory and invalid and without warrant or authority in law.

3. Because said Ordinance and the enforcement thereof would deprive protestant of its property and property rights without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington.

4. Because said Ordinance and the enforcement thereof [fol. 22] would take protestant's private property for public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Washington.

5. Because said Ordinance and the enforcement of its terms would deny protestant equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

6. Because said Ordinance illegally seeks to impose upon the protestant additional and unjust obligations which violate the terms of its several franchises thereby impairing said franchises in contravention of Article I, Section 10 of the Constitution of the United States.

7. Because said Ordinance and the enforcement of its terms would take from protestant the property rights and

privileges enjoyed by protestant under its franchises, without due process of law in contravention of the Fourteenth Amendment to the Constitution of the State of Washington.

8. Because the tax sought to be imposed by said Ordinance is so discriminatory, unjust and unfair and so unreasonably high that its enforcement would bring about the confisaction of protestant's property in contravention of the due process clause of the Fourteenth Amendment of the Constitution of the United States of America.

9. Because this protestant and the City Light Department are in direct, keen and active competition, notwithstanding which said Ordinance discriminates against protestant in favor of said City Light Department, in that it does not require payment of said tax by the City of Seattle out of revenues received by it from its Lighting Department and provides no valid or other method whereby tax ostensibly imposed upon the City Light Department can be enforced or collected and to that extent is ineffective and wholly null and void in that both in fact and in law it exempts the city's competing utility from payment of said tax, and further because the prior pledge of the gross revenues received by the City of Seattle from the sale of electric light and power to the payment of the revenue bonds of the City deprives the City of Seattle of any lawful right to divert from such gross revenues the amount of money necessary to enable the city to pay the fee or tax which the ordinance ostensibly requires the city to pay, and further because under the Seattle budget for 1932 any attempt by any officer or employee of the City of Seattle to pay said tax for the year 1932 out of revenues of its lighting department would be in violation of the law of the State of Washington, and while the Ordinance and the enforcement thereof as to protestant would require actual payment by it of the fee or tax provided therein, the City of Seattle as to its similar competing utility business owned and operated by it in its proprietary capacity is in fact and in law and by the terms of said ordinance exempt from payment of said fee or tax; that such classification is discriminatory, arbitrary, unreasonable, unreal, unfair and unlawful, and in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington.

[fol. 23]

10. Because said Ordinance is an illegal attempt by the City of Seattle to regulate the rates, charges, business and operations of this protestant, in violation of the laws of the State of Washington delegating such authority solely and exclusively to the Department of Public Works of the State of Washington, and is an illegal attempt by said City to usurp the functions and powers of said Department.

11. Because said Ordinance unlawfully seeks to compel [fol. 24] this protestant upon penalty of fine and/or imprisonment, or both, to pay said tax and to obtain a new and additional license to carry on its business as a condition precedent to the exercise of the precise rights and privileges granted by its franchises.

12. Because protestant's property is coupled with a public interest and it is obligated to serve the citizens of Seattle uninterruptedly and to give to each class of customers the same measure of service for the same measure of money, and is without authority to discontinue such service independently of whether the license specified in said Ordinance is granted or withheld.

13. Because the license fee or tax provided by said Ordinance is not levied in pursuance of law as required by Article VII, Section 5 of the Constitution of the State of Washington.

14. Because *of* the license fee or tax provided by said Ordinance is not uniform in respect to persons and property within the jurisdiction of the City of Seattle as required by Article VII, Section 9 of the Constitution of the State of Washington.

15. Because the method of appeal and review provided in said Ordinance is indefinite, inadequate, unfair and unlawful in that it denies to protestant the right to a fair and impartial review of the determination of the City Council of the City of Seattle as to the amount of the tax protestant may be required to pay, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington.

16. Because the Ordinance, and particularly Section 2 thereof in which the term "gross income" is defined, is

vague, indefinite and uncertain with respect to the amount of the tax to be paid and the manner by which the amount may be ascertained, to an extent that the taxpayer may not without litigation determine with any degree of certainty the amount of the tax he would owe, and is, therefore invalid and unenforceable, even though the ordinance were [fol. 25] not otherwise invalid.

Seattle Gas Company, by C. K. Poe, Its Attorney.
Poe, Falknor, Falknor & Emory, Attorneys for Seattle Gas Company.

Received July 1st, 1932.
H. W. Carroll, City Comptroller, by John L. Downing, Deputy.

Received July 1, 1932.
H. L. Collier, City Treas., by H. B. Lund, Asst.

[fol. 26] EXHIBIT "A" TO AMENDED COMPLAINT

Ordinance No. 62662

An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges, defining offenses and providing penalties

Be it ordained by the City of Seattle as follows:

Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. Definitions: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied;

Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts, (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any in-

terest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Person or Persons: Persons of either sex, firms, copartnerships, corporations and other associations of natural persons, whether acting by themselves or by servants, agents or employes.

Taxpayer: Any person liable to the license fee or tax imposed by this ordinance.

[fol. 27] Tax Year or Taxable Year: The year commencing March 1st and ending on the last day of February of the following year, or, in lieu thereof the taxpayer's fiscal year when permission is obtained from the City Comptroller to use the same as the tax period.

Section 3. "Occupation License" Required: After the 1st day of July 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an "Occupation License".

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his "Occupation License" so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 4. License Tax Year: All "Occupation Licenses" shall be for the tax year for which issued and shall expire at the end of such tax year.

Such "Occupation License" and the fee or tax therefor hereby imposed shall be for the year commencing March 1st and ending on the last day of February of the following year; Provided, however, that if the taxpayer in transact

ing his business keeps the books reflecting the same for a fiscal year not based on the calendar year, he may, with the assent of the City Comptroller, obtain his license for the period of his current fiscal year which shall be deemed his tax year, and pay the fee or tax computed upon his [fol. 28] gross income made during his fiscal year (next preceding his tax year) covering his accounting period as shown by the method of keeping the books of the business.

Section 5. Occupations Subject to Tax—Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

(d) Upon every person conducting or engaged in the business of supplying steam heat or power to the public for hire, a fee or tax equal to four per cent (4%) of the

total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Fifty ($50.00) Dollars per tax year.

(e) Upon every person engaged in the business of operating or conducting a fire alarm system, district telegraph or burglary and police alarm system for hire, a fee or tax equal to two per cent (2%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; [fol. 29] provided, however, that the minimum fee or tax shall not be less than One Hundred ($100.00) Dollars per tax year.

Section 6. City of Seattle Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

Section 7. Occupations and Privileges Subject to Tax—Amount: There are hereby levied, and shall be collected, annual license fees or occupation taxes against the persons on account of the business activities or privileges and in the amounts hereinafter fixed, as follows:

(a) Upon every person engaged in or carrying on the business of operating any motor vehicle for the transportation of passengers for hire at rates per trip or based on the distance and/or time employed, and driven by the owner or his representative under the routing or direction of the passenger or person hiring the same, the following tax or fee:

When such vehicle does not stand in or upon any public street, alley or other public place, or upon any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Fifteen ($15.00) Dollars per tax year; [fol. 30] For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Twenty ($20.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, Seventy-two ($72.00) Dollars per tax year.

When such vehicle stands in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Thirty ($30.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, Forty ($40.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, Seventy-two ($72.00) Dollars per tax year.

In determining the seating capacity of any such vehicle the driver and conductor shall be included.

(b) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the purpose of sight-seeing or showing points of interest, and not elsewhere herein mentioned and licensed, [fol. 31] a fee or tax in the same amount as required for the business of operating the vehicles mentioned in Sub-Section (a) of this section; provided, however, that the vehicles mentioned in this sub-section may be operated by the licensee at rates based on time employed, whether for sight-seeing purposes or not (known as "for hire" service) without securing in addition the license required by said Sub-Section (a).

In determining the seating capacity of any such sight-seeing vehicle the driver and announcer shall be included.

(c) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the transportation of passengers for hire between common carrier passenger terminals or depots and hotels, and not elsewhere herein mentioned and licensed, for each vehicle Sixty ($60.00) Dollars per tax year.

(d) Upon every person engaged in or carrying on the business of letting the use of any motor vehicle at rates per trip or based on distance traveled, or time employed, and to be driven and routed or directed by the person or persons hiring or renting the same, the following tax or fee:

For each such vehicle which does not stand in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment, Fifteen ($15.00) Dollars per tax year;

For each such vehicle standing in or upon any public street, alley or other public place, or any place open to the use of the public for vehicles while awaiting employment, Thirty ($30.00) Dollars per tax year.

(e) Upon every person engaged in or carrying on the business of operating any vehicle drawn by or attached to any motor driven vehicle and used for the transportation [fol. 32] of baggage, express freight, household goods, merchandise or materials for hire, and which vehicle receives or discharges baggage, express, freight, household goods, merchandise or other materials at points within or without the City, and which does not operate over a defined route:

For each such vehicle of not more than 1 ton capacity—$3.00 per tax year.

For each such vehicle of not more than 2 tons capacity—$6.00 per tax year.

For each such vehicle of not more than 3 tons capacity—$9.00 per tax year.

For each such vehicle of not more than 4 tons capacity—$12.00 per tax year.

For each such vehicle of not more than 5 tons capacity—$15.00 per tax year.

For each such vehicle of not more than 6 tons capacity—$18.00 per tax year.

For each such vehicle of more than 6 tons capacity—$21.00 per tax year.

No license required by this ordinance for the operation of any vehicle shall be issued unless the licenses and/or permits therefor required by law or ordinances other than this have been granted.

Section 8. Tax Apportioned for Year 1932: For the remainder of the tax year 1932, ending on the last day of February, 1933, the fees or taxes herein imposed shall be apportioned in the ratio of said remainder to a full tax year. [fol. 33] Section 9. Exceptions and Deductions: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services.

Nothing in this ordinance shall be construed as requiring a license or the payment of a license fee or tax, or the doing of any act, which would constitute an unlawful burden or interference in violation of the Constitution or laws of the United States, or which would not be consistent with the Constitution or laws of the State of Washington.

Any person subject to the payment of a license fee or tax under the provisions of any ordinance of the City, other than this, on account of engaging in any activity for which he is liable to tax hereunder, may deduct the amount of such fee or tax imposed by this ordinance on account of such activity, but such person shall nevertheless in the manner herein provided for, apply for and procure an "Occupation License".

Section 10. Application or Return for License: On or before the 1st day of July, 1932, and thereafter on or before the first day of each tax year, every taxpayer shall apply to the City Comptroller for an "Occupation License" upon blanks or forms of return to be prepared and provided by him requesting such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax. [fol. 34] The taxayer shall, in a legible manner write in such blank or form of return the information required and shall sign the same and by affidavit at the foot thereof shall

swear or affirm that the information therein given is full and true and that he knows the same to be so.

Every such application or return shall be accompanied by a remittance by bank draft, certified check, cashier's check or money order, payable to the City Treasurer, or in cash, in the amount of the tax or fee or installment thereof required by the provisions hereof.

If the applicant be a partnership, the application or return must be made by one of the partners; if a corporation, by one of the officers thereof; if a foreign corporation, co-partnership or non-resident individual by the resident agent or local manager of said corporation, co-partnership or individual.

Section 11. Monthly and Quarterly Payment of Tax: Where the amount of the license fee or tax is based upon gross income the taxpayer may pay his fee or tax in equal monthly installments during the life of his license, each such installment to be paid on or before the 10th day of the month. In all other cases the taxpayer may pay his fee or tax in equal installments during the life of his license, each such installment to be paid on or before the 1st day of March, the 1st day of June, the 1st day of September and the 1st day of December respectively.

Section 12. When Tax Based on Current Year—Commencement of Business During Tax Year: When a business, occupation or pursuit subject to tax upon gross income has not been carried on for the full calendar or fiscal year next preceding the tax year for which license is required, the license fee or tax shall be paid monthly in installments during the life of the license on or before the 10th day of the month, and shall be based upon the gross [fol. 35] income for the month next preceding that in which payment is due. In such cases the taxpayer shall make monthly returns similar to the annual returns provided for herein on or before the 10th day of the month under oath or affirmation covering the business of the previous month.

In all other cases where a person commences during any tax year to engage in any business, occupation, pursuit or privilege he shall be entitled to a license for the remainder of such tax year for the required fee apportioned in the ratio of said remainder to a full tax year.

Section 13. Monthly Payments—License Prerequisites: In any case where the taxpayer pays his license fee or tax monthly he shall nevertheless first procure his "Occupation License" in the manner herein required before commencing or continuing in business, and shall pay the minimum fee or tax therefor, which shall be credited against future installments.

Section 14. Sale or Transfer of Business: Upon the sale or transfer during any tax year of a business on account of which a fee or tax is hereby required, the purchaser or transferee shall, if the fee or tax has not been paid in full for said year, be responsible for its payment for that portion of said year during which he carries on such business.

Section 15. Taxpayer to Keep Books and Records—Returns Confidential: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller pursuant to this ordinance, shall not be made public nor shall they be subject to the inspection of any [fol. 36] person except the Mayor, the Corporation Counsel, the City Comptroller or his authorized agent, and members of the City Council.

Section 16. Comptroller to Investigate Returns: If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpœna to the taxpayer, or any other person,

to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpœna, require him, or any person, to bring with him such books, records, and papers as may be necessary.

Section 17. Over or Underpayment of Tax: If the City Comptroller upon investigation or upon checking returns finds that the fee or tax paid on any of them is more than the amount required of the taxpayer, he shall refund the amount overpaid by a warrant upon the General Fund. If the City Comptroller finds that the fee or tax paid is less than required, he shall send a statement to the taxpayer showing the balance due, who shall within three (3) days pay the amount shown thereon.

Section 18. Remedy for Non-payment of Tax: If any taxpayer fails to apply for license or make his return, or to pay the fee or tax therefor or any part thereof, within three (3) days after the same shall have become due, the City Comptroller shall ascertain the amount of the fee or tax or installment thereof due and shall notify such tax-[fol. 37] payer thereof, who shall be liable therefor in any suit or action by the City for the collection thereof. The City Comptroller shall also notify the Corporation Counsel in writing of the name of such delinquent taxpayer and the amount due from him and said officer shall, with the assistance of the City Comptroller, collect the same by any appropriate means or by suit or action in the name of the City.

Section 19. Appeals to City Council: Any taxpayer aggrieved by the amount of the fee or tax found by the City Comptroller to be required under the provisions of this ordinance, may appeal to the City Council from such finding by filing a written notice of appeal with the City Clerk within five (5) days from the time such taxpayer was given notice of such amount. The Clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than ten (10) days after the filing of the notice of appeal, and he shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing, the taxpayer shall be entitled to be heard and to introduce evidence in his own behalf. The City Council shall thereupon ascertain the

correct amount of the fee or tax by resolution and the City Clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal, if appellant is unsuccessful therein, must be paid within three (3) days after such notice is given.

The President of the City Council, or the Chairman of any committee thereof before which the appeal is to be heard, may, by subpœna, require the attendance thereat of any person, and may also require him to produce any pertinent books and records. Any person served with such subpœna shall appear at the time and place therein stated and produce the books and records required, if any, and shall testify truthfully under oath administered by the [fol. 38] Chairman in charge of the hearing on appeal as to any matter required of him pertinent to the appeal, and it shall be unlawful for him to fail or refuse so to do.

Section 20. Comptroller to Make Rules: The City Comptroller shall have the power, and it shall be his duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with, any such rule or regulation.

Section 21. Licenses—Posting—Unlawful Use of: All licenses issued pursuant to the provisions of this ordinance shall be kept posted by the licensee in a conspicuous place in his principal place of business in the City, except that all licenses for the operation of a vehicle shall be attached in a conspicuous place upon the right hand side of such vehicle in a suitable holder to be furnished by the City Comptroller upon the payment of a fee of Twenty five ($.25) Cents.

No person to whom a license has been issued, pursuant to this ordinance, shall suffer or allow any other person chargeable with a separate license to operate under or display his license, nor shall such other person operate under or display such license.

Section 22. False Returns, etc.: It shall be unlawful for any person liable to tax hereunder to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make any false or fraudulent application or return or any false

statement or representation in, or in connection with, any such application or return, or to aid or abet another in any attempt to evade payment of the fee or tax, or any part thereof, or for any person to fail to appear and/or testify in response to subpœna issued pursuant hereto, or to testify falsely upon any investigation of the correctness of a [fol. 39] return, or upon the hearing of any appeal, or in any manner to hinder or delay the City or any of its officers in carrying out the provisions of this ordinance.

Section 23. Effect of Partial Invalidity: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Section 24. Penalty: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 25. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council the 23rd day of May, 1932, and signed by me in open session in authentication of its passage this 23rd day of May, 1932.

James Scavotto, President pro Tem of the City Council.

Approved by me this 25th day of May, 1932.

Philip Tindall, Acting Mayor.

Filed by me this 25th day of May, 1932.

Attest:

H. W. Carroll, City Comptroller and ex-Officio City Clerk, by E. M. Street, Deputy Clerk. (Seal.)

Date of official publication in the Daily Journal of Commerce, Seattle: May 31, 1932.

[fol. 40] In Superior Court of King County

[Title omitted]

Demurrer to Amended Complaint—Filed Oct. 4, 1932

Comes now the above named defendant and demurs to the amended complaint in the above entitled action, for the reason that the same fails to state facts sufficient to constitute a cause of action, either at law or in equity.

A. C. Van Soelen, Corporation Counsel; Walter L. Baumgartner, Assistant, Attorneys for Defendant.

Copy of within received Oct. 4, 1932.

Poe, Falknor, Falknor & Emory, Att'ys for ——.

[File endorsement omitted.]

[fol. 41] In Superior Court of the State of Washington for King County

No. 255,177

Seattle Gas Company, a Corporation, Plaintiff,

vs.

The City of Seattle, a Municipal Corporation, Defendant

Judgment and Decree of Dismissal—Filed Oct. 10, 1932

This cause came on for hearing before the Honorable J. T. Ronald, one of the judges of the above entitled court, on this 10th day of October, 1932, plaintiff appearing by Poe, Falknor, Falknor & Emory, its attorneys, and defendant appearing by A. C. Van Soelen, Corporation Counsel, and Walter L. Baumgartner, Assistant; and the Court having entered an order on this date sustaining the demurrer of the defendant to plaintiff's amended complaint herein, to which order plaintiff duly excepted, thereupon said plaintiff by its said counsel gave notice in open court that it elects to stand upon the said amended complaint and declines to plead further;

Wherefore, by reason of the law and the premises, it is by the court considered, ordered and decreed that plaintiff's first cause of action and plaintiff's second cause of action, and each of them, be and each is hereby dismissed, and that defendant go hence without day, and that defendant recover of plaintiff its costs and disbursements herein.

At the time of the signing of this judgment plaintiff duly excepted to the same and said exception is hereby allowed.

Done in open Court this 10 day of October, 1932.

J. T. Ronald, Judge.

Presented by Walter L. Baumgartner.

[fol. 42] In Superior Court of King County

Order Allowing Appeal

At the time the above and foregoing Judgment and Decree is entered and made, the above named plaintiff in said cause by its said attorneys gives notice in open Court that it appeals from said judgment and decree and from each and every ruling of the Court adverse to plaintiff, to the Supreme Court of the State of Washington, and said appeal is hereby allowed, and the Clerk of this Court is directed to make an entry of said notice of appeal in the journal of the Court.

Done in open Court this 10 day of October, 1932.

J. T. Ronald, Judge.

Presented by Walter L. Baumgartner.
Entered in Execution Docket, vol. 109, page 279.
Judgment number 118,508.

[File endorsement omitted.]

[fols. 43 & 44] Bond on appeal for $200.00, approved and filed Oct. 11, 1932, omitted in printing.

[fol. 45] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 46] IN SUPREME COURT OF WASHINGTON

En Banc

No. 24296

PUGET SOUND POWER & LIGHT COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, Respondent

OPINION—Filed April 21, 1933

This is a companion case to Pacific Telephone & Telegraph Co. v. City of Seattle, — Wash. Dec. —; and, like that case, is here on appeal by plaintiff from a judgment of dismissal after a demurrer to the amended complaint had been sustained. The assignments of error are:

"I. The court erred in sustaining respondent's demurrer to appellant's amended complaint.

"II. The court erred in dismissing appellant's first cause of action.

"III. The court erred in dismissing appellant's second cause of action.

"IV. The court erred in failing to hold that the enforcement of the ordinance as to appellant would contravene article I, § 10, and the Fifth and Fourteenth Amendments to the Constitution of the United States, and article I, §§ 3, 14 and 16, and §§ 5 and 9 of article VII of the Constitution of the State of Washington."

The following provisions of ordinance No. 62,662, in addition to those set out in the opinion in the Telephone Co. case, are pertinent to the questions raised by the appellant in this case:

"Section 5. * * *

"(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent (3%) of the total gross income from such business in the city during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax

shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year."

"Section 6. City of Seattle, Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the city of Seattle, except that said city shall not as a taxpayer, be required to conform to the other provisions of this ordinance."

[fol. 47] The appellant raises some twenty-seven objections to the ordinance, all of which were disposed of in the Telephone Co. case, with the exception of two. These are: (1) That the tax is in contravention of appellant's rights under its franchise from the city; and (2) that the tax is peculiarly discriminatory, unreasonable and confiscatory, as to it, by reason of the fact that the city, in its proprietary capacity, is a competitor of appellant in the power and light business.

I. The Fourteenth Amendment of the state constitution provides: "The power of taxation shall never be suspended, surrendered or contracted away." This, however, does not answer appellant's first contention, since its franchise antedates the amendment. Whether or not the State or a municipality may barter away its taxing power is a question upon which the authorities generally are not in harmony. There are strong reasons why it should be held that it may not. State v. Hannibal & St. Joseph R. R. Co., 75 Mo. 208; City of Portland v. Portland Ry., Light & Power Co., 156 Pac. 1058. For the purposes of this case, however, we do not find it necessary to pass upon that question, for, in any event, the intent to relinquish the power to tax must not only be clear but distinctly expressed. It is a doctrine that is indulged in no implications. The question is put and the rule concisely stated in City of St. Louis v. United Railways Co., 210 U. S. 266, as follows:

"The theory, then, upon which the bill was framed and this case decided was that the city, having once fixed a price for the use of its streets, which the railway companies had agreed to pay, there was no right to impose a license tax upon the railway companies under the ordinance. * * *

"The principles involved in this case have been the subject of frequent consideration in this court, and while it

can be no longer doubted that a State or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that such deprivation can only follow when the State or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption."

No terms of appellant's franchise have been called to our attention which could be interpreted as a relinquishment by the city of any of its powers of taxation.

[fol. 48] II. In principle, appellant's second proposition is akin to the first. The question is: Can the State's power of taxation be abridged or abrogated by estoppel? In the abstract, the question would seem to merit scant consideration; but the allegations of the amended complaint reveal a condition of unfair competition, created by the exaction of this tax from the appellant, which commands the careful attention of a court of equity.

The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind, the city council, by virtue of § 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met

as though § 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom.

Conceding, for the sake of argument, that to be the situation, counsel for the city seek to sustain the tax against [fol. 49] appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification of persons and occupations subject to the tax; and that a privately owned light and power business is subject to a different classification than one owned by a municipality—that the one may properly be subjected to the excise and the other exempted.

In passing, it is to be noted that the ordinance is a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. Some half dozen businesses enjoying peculiar privileges in and upon the streets of the city are included within its purview. The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance.

The expediency of imposing excise taxes and the classification of persons and occupations affected is a legislative problem, so long as the exaction is not inherently oppressive and the classification is reasonable. As we have seen, in the case of Pacific Tel. & Tel. Co. v. City of Seattle, — Wash. Dec. —, the tax imposed by this ordinance is not inherently oppressive. The question here is whether the classification as between the appellant and the city, in its ownership in a proprietary capacity of a light and power business, is reasonable. In the case of State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, Mr. Justice Roberts said:

"The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; Southwestern Oil Co. v. Texas, 217 U. S. 114; Brown-Forman Co. v. Ken-

tucky, 217 U. S. 563. The fact that a statute discriminates [fol. 50] in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & Lewis Co., 240 U. S. 342; Quong Wing v. Kirkendall, 223 U. S. 59. As was said in Brown-Forman Co. v. Kentucky, supra, at p. 573:

"'A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

In the case of South Carolina Power Co. v. South Carolina Tax Commission, 52 Fed. (2d) 515, a statutory three judge court applied this rule to the identical problem with which we are here confronted. An act of the legislature, imposing an excise on persons and companies generating electricity by hydroelectric and steam power, was under consideration. The act contained the following proviso:

"Provided, further, That the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers."

In answer to the contention that this was an unreasonable classification, Mr. Justice Parker, speaking for the court, said:

"So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its

operations are conducted, not for private profit, but for the benefit of the public or its citizens. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the Fourteenth Amendment. See Village of Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note."

Appellant, in support of its position, cites three cases: Texas Electric Service Co. v. City of Seymour, 54 Fed. (2d) 97; Great Northern Utilities Co. v. Public Service Commission, 52 Fed. (2) 802; Los Angeles Gas & Electric [fol. 51] Co. v. City of Los Angeles, 241 Fed. 912 (affirmed 251 U. S. 32). In none of these cases was the taxing power involved. In each it is held that the municipality could not, under the guise of an exercise of its police power, impose an oppressive regulation upon a competitor in a business in which the municipality itself was engaged. These cases do not go to the extent of holding that estoppel can be invoked against the State or a municipality in the legitimate and necessary exercise even of the police power.

The applicability of the doctrine of estoppel to the exercise of the police power has been effectively denied in a number of cases. New Orleans Gas Light Co. v. Drainage Commission of New Orleans, 197 U. S. 453; New York and N. E. Railroad Co. v. Bristol, 151 U. S. 556; Butchers' Union, etc. Co. v. Crescent City, etc. Co., 111 U. S. 746; Stone v. Mississippi, 101 U. S. 814; Beer Co. v. Massachusetts, 97 U. S. 25. In the latter case it is said:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. * * *

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.

The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In New York & N. E. Railroad Co. v. Bristol, supra, the rule is stated as follows:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not vio- [fol. 52] lated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

If this be true of the police power, the exercise of which depends upon the existence of government, it must be equally true of the taxing power upon which the very existence of government depends. The doctrine of estoppel, applied to the power of taxation, is inconsistent with any conception of government, for, carried to the ultimate, it would result in the destruction of the State. South Carolina v. United States, 199 U. S. 437. See, also, Everett v. Adamson, 106 Wash. 355, 180 Pac. 144.

The judgment is affirmed.

Blake, J.

We concur.

Beals, C. J. Holcomb, J. Millard, J. Mitchell, J. Main, J.

Tolman, J., took no part.

[fol. 53] IN SUPREME COURT OF WASHINGTON

No. 24296

DISSENTING OPINION

STEINERT, J., dissenting:

As stated in the majority opinion, this is a companion case to Pacific Telephone & Telegraph Co. v. City of Seattle,, — Wash. Dec., —, — P. (2d) —. All but two of this appellant's objections to the ordinance in question were disposed of in that case. My dissent in that case applies with equal force here. Since the majority opinion discusses and disposes of the two additional questions, my dissent is likewise extended, inasmuch as I disagree with the majority upon both questions.

The first question deals with appellant's rights under its existing franchise. The appellant here already had a complete and unqualified operating franchise from the city to engage in and and carry on the business of selling and furnishing electric light and power for hire in the city of Seattle until March 14, 1952. By virtue of that franchise it had the express right to construct, maintain and operate its equipment and apparatus and to erect poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets and public places of the city. The grant was subject to repeal, change or modification for failure to operate in accordance with the provisions of the ordinance, or at all. Relying upon that franchise, the appellant made large investments of money installing its plant and equipment and building up its service. It is now under the burden and duty of continuous operation. Its property is devoted to a public use. It can not cease its operations, nor has the city power to authorize it to cease doing business. A fortiori the city can not alter or amend the contract to the detriment of the grantee by the imposition of additional burdens. Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650; Hot Springs [fol. 54] Electric Light Co. v. City of Hot Springs, 70 Ark. 300, 67 S. W. 761; Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32, 64 L. Ed. 121; McQuillin, Municipal Corporations, Vol. 2, § 806.

In the Everett case, after stating that the municipality may, as a condition precedent to the use of its property, exact of the user such terms and conditions as it may deem necessary to impose, we said on p. 269:

"But it does not follow that the city may grant a franchise to a corporation to use its streets and other public places upon terms mutually agreed upon, and then afterwards during the life of the franchise annex additional burdens thereto without the consent of the grantee inconsistent with the rights granted. While it may not surrender the right of regulation necessary to the public health and safety, or the general taxing power (Const., art. 7, § 4), it can make a valid and binding contract concerning the terms upon which the grantee may make use of public places; such a contract as cannot be changed or altered at the will of the city without the consent of the other party thereto."

The crowning reason, in my opinion, for holding the ordinance inoperative and void as to this appellant is that it constitutes an unlawful exercise by the city of a governmental power in aid of its proprietary business. The city is a competitor of the appellant. Both are engaged in a similar business for profit. The appellant's franchise is not exclusive, hence it can not complain of competition. It may not even complain if the city should see fit to appropriate its property for public use by condemnation. But so long as appellant is permitted to function as a competitor, its property may not be taken from it without due process of law, and that, in effect, is just what the ordinance does. The validity of the tax must be determined by its true operation and effect on the basis of the results which follow its operation. Aberdeen Savings & Loan Assn. v. Chase, 157 Wash. 351, 289 Pac. 536; Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. Ed. 400.

In practical operation, the appellant must not only meet the competitive rates established by the city, but it must also comply with the regulations made by the Department of Public Works regarding its rates. The city is under no [fol. 55] such regulation, but has exclusive control of its own rates. If the appellant had no competition, it might secure from the state department the right to pass on to its customers the amount of the tax, upon a showing that

its rate of return was insufficient to enable it to pay such tax. That attempt, however, would be futile so long as the city maintained a lower standard of rates. By the ordinance the city has the right of inspection of appellant's books of account. If the power to enforce such a tax as prescribed by the ordinance be granted to the city, then the amount thereof can be fixed as the city pleases, and at such a figure as it may determine from appellant's own books will result in the elimination of appellant as a competitor. Contrary to the view of the majority, I think that the following cases are applicable and controlling here, both as authority and in reason: Texas Electric Service Co. v. City of Seymour, 54 Fed. (2d) 97; Great Northern Utilities Co. v. Public Service Commission, 52 Fed. (2d) 802; Los Angeles Gas & Electric Co. v. City of Los Angeles, 241 Fed. 912 (affirmed in 251 U. S. 32). In the case last cited, the District Judge, on p. 921, said:

"I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

If this ordinance be upheld, it will result in appellant being required to pay to the city approximately one hundred and twenty thousand dollars a year out of its gross earnings for the privilege of transacting business; while the city, even under the majority opinion, is entirely relieved of that handicap. It would therefore profit directly at the expense of its competitor. The city having entered into a field of competition in its proprietary capacity, enters it under the law of the survival of the fittest, and may [fol. 56] not, therefore, draw sustenance from its competitor through an assumption of public and governmental functions, to the strangulation of the one with whom it voluntarily competes.

I therefore dissent.

Steinert, J.

[fol. 57] IN SUPREME COURT OF WASHINGTON

En Banc

No. 24327

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle, Respondents

OPINION—Filed April 21, 1933

The plaintiff brought this action to enjoin the defendant from collecting a license tax under ordinance No. 62,662, being entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain business, occupations, pursuits and privileges; defining offenses and providing penalties."

A demurrer interposed to the amended complaint was sustained. The plaintiff, electing to stand on the pleading, appeals from a judgment dismissing the action and assigns error as follows:

"I. The court erred in sustaining respondents' demurrer to appellant's amended complaint.

"II. The court erred in dismissing appellant's cause of action.

"III. The court erred in failing to hold that the enforcement of the ordinance as to appellant would contravene the Fourteenth Amendment to the Constitution of the United States, and article I, §3, and article VII, §9, of the constitution of the state of Washington."

The pertinent provisions of the ordinance are:

"Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue."

"Section 2. * * * Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduc-[fol. 58] tion on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

"Section 5. Occupations Subject to Tax-Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income as follows:

"(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the city during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year."

The appellant sets up some twenty-one separate grounds or reasons why the tax sought to be collected from it under the ordinance is invalid. For the purposes of this discussion, these may be classified into five groups: (1) That the city has no power to levy such a tax; (2) that the state has preempted this field of taxation; (3) that the definition of "Gross Income" is so indefinite and uncertain that neither the income subject to the tax nor the amount thereof can be ascertained; (4) that the tax is unreasonable, oppressive and confiscatory; and (5) that the tax is in contravention of appellant's rights under the Act of Congress of July 24, 1866, known as the Post Roads Act.

I. It is first contended that there is no grant of power from the state to the city to levy such a tax. The power, under which the right to levy the tax is asserted, is found in Rem. Comp. Stat., §§ 8966 and 8981.

Section 8966 relates to the powers of cities of the first class, and, among other things, provides:

"Any such city shall have power—

* * * * * * *

"33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same: Provided, that no license shall be granted to continue for longer than one year from the date thereof; * * *."

Section 8981 provides:

[fol. 59] "Any city adopting a charter under the provisions of this act shall have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not."

This court has held in numerous cases that cities and towns, under the powers granted, have the right to impose license taxes either for the purpose of regulation or revenue. Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652.

Speaking of the grant of power contained in subdivision 33, § 8966, supra, in the Fleetwood case, Judge Dunbar said:

"This provision is in relation to cities of the first class * * * The language is comprehensive. The authority is to grant licenses for any lawful purpose, and, in the absence of restriction, the purpose of raising revenue is as lawful as the purpose of exercising the police power. This interpretation is borne out, we think, by the authorization of the legislature to cities of other classes. * * * And so the power to license for purposes of revenue is especially granted to all the other classes of cities."

We think that, by virtue of § 8981, supra, the power to license for purposes of revenue is also "especially

granted" to cities of the first class. In any event, subdivision 33 of § 8966 has been uniformly construed to confer such power. Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650.

II. It is contended that, conceding the power, the city is precluded from exercising it, because the state has preempted this field of taxation. With respect to police powers, it is a rule of universal application that a municipality may not enact regulatory ordinances upon subjects covered by state legislation. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Whether this rule is [fol. 60] applicable in cases involving the exercise of the taxing power, it is not necessary for us to determine, because the state had not entered this field of taxation at the time the ordinance in question was enacted.

It must be kept in mind that the power granted to the city to issue licenses is dual: (1) for regulation; (2) for revenue. The power here exercised is for revenue and not for regulation. Here the granting of the license is an incident to the power to raise revenues. The license is the means, not the end. It is the method provided for raising the revenues. The penalty provided is merely a mode of enforcing payment, and the license is only a receipt for the tax. Home Insurance Co. v. City Council, 93 U. S. 116. The tax is an excise. It is levied upon the right to do business, not upon the right to exist; nor upon the property. The cases relied upon by appellant on this point so characterize such a tax. State ex rel. Zielonka v. Carrel, 124 N. E. 134; Cincinnati v. American Telephone & Telegraph Co., 147 N. E. 806; Firestone v. Cambridge, 148 N. E. 471.

In I Cooley on Taxation (4th ed.), § 26, it is said:

"One distinction between a tax upon a business * * * and a license is said to be 'that the former is exacted by reason of the fact that the business is carried on * * * within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business * * * within the jurisdiction.' So it has been said that a charge cannot be deemed a license rather than a tax unless the payment thereof confers some right or privilege upon the person charged which otherwise would not exist."

A license is granted under the police power; an excise is imposed under the taxing power. The former is essentially not a tax at all. I Cooley, Taxation (4th ed.), § 26.

"The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, although the purpose is essentially different. The one is made for regulation and the other for revenue. If for regulation, it is an exercise of the police power while if for revenue it is an exercise of the taxing power." I Cooley, Taxation (4th ed.), § 27.

[fol. 61] Bearing this distinction in mind, we shall examine briefly the statutes, by virtue of which appellant contends that the state has preempted the field of taxation covered by the ordinance.

Laws of 1929, chapter 107, requires public utility companies, subject to regulation as to rates and charges by the department of public works, to "pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue. * * *" This act is amendatory of § 1 of chapter 107 of the Laws of 1923, which in turn was amendatory of §§ 1 and 3 of chapter 113 of the Laws of 1921. The earlier laws fixed flat rates, determined by gross earnings, ranging from five dollars to $1,500.

Laws of 1921, chapter 113, § 1, refers to persons and corporations required to file statements with the director of public works under § 78, chapter 117, Laws of 1911, and requires them to pay "a fee" in accordance with a fixed schedule. Section 2, chapter 113, Laws of 1921, then provides:

"All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer and by him deposited in a *fund to be known as the public service revolving fund.*"

Chapter 117, Laws of 1911, is the public service commission law, and is purely a regulatory act. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Obviously, chapter 107, Laws of 1929, chapter 107, Laws of

1923, and chapter 113, Laws of 1921, are adjuncts to that act. It is equally obvious, from the words which we have italicized in § 2 of the latter act, that the fund created was solely for the purpose of defraying the expense attendant to the administration of the public service commission law. We think it is clear, from the entire context of the act of 1921, that the purpose of it was regulatory. The raising of the rates in the act of 1923 and the changing of the [fol. 62] method of computation of the fee to be paid in the act of 1929 have not changed its character.

It is further contended that by chapter 227, Laws of 1929, the state has preempted this field of taxation. That act is entitled, "An Act relating to fees of foreign and domestic corporations * * *;" and the tax exacted has been held to be a license fee to which corporations are subjected for the privilege of doing business in this state in a corporate capacity—as a corporate entity. In Spokane International Ry. Co. v. State, 162 Wash. 395, 299 Pac. 362, construing this act, it is said:

"The tax is upon the privilege the state grants to the corporation to engage in commerce with the advantages derived from a corporate organization, not upon the commerce itself."

III. That "Gross Income" is a proper basis for determining the amount of the tax to be paid, is well established by the authorities. I Cooley, Taxation (4th ed.), § 42; State v. Minnesota & International R. Co., 118 N. W. 679; State v. Central Trust Co., 67 Atl. 267; People ex rel. Westchester Lighting Co. v. Gaus, 92 N. E. 230; State v. United Electric Light & Water Co., 97 Atl. 857; Nebraska Telephone Co. v. Lincoln, 117 N. W. 284. The definition of "Gross Income," contained in the ordinance, is substantially the same as that contained in the act of West Virginia, considered in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. The tax challenged in that case was sustained. It would be practically impossible to define "Gross Income" so that more or less pertinent objections could not be aimed at the definition. We are satisfied, however, that the objections raised by appellant are more fancied than real; and that, in practical application, under present day systems of accounting, appellant will have no serious difficulty in ascer-

taining the amount of tax it is required to pay. The task of segregating revenues derived without the city from those derived within, affords no legal objection to the tax. [fol. 63] Western Union Tel. Co. v. Fremont, 58 N. W. 415; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692.

IV. It is next contended that the tax is unreasonable, oppressive and confiscatory. "The power to tax carries with it the power to destroy," has been so frequently stated that it has become axiomatic. Yet, practically, the power to tax is limited to what is reasonable. Oppressive or confiscatory taxes ordinarily will not be sustained. But whether a tax is reasonable is primarily a legislative problem, and the courts will not hold a tax invalid on the ground that it is oppressive or confiscatory unless there is clear abuse of the power conferred. It is said in IV Cooley, Taxation (4th ed.), § 1714:

"Where an excise tax is imposed for revenue, as distinguished from a fee imposed merely for regulation, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue does not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose, where the business or occupation is a useful and lawful one, although there is some authority apparently to the contrary which would preclude a court from considering the amount of the tax in any case. So far as the right to engage in a business of a harmless and useful character is concerned, 'the state may not impose an occupation tax which shall operate as a prohibition or as a burden of magnitude sufficient to render the right valueless.' But a tax for revenue possibly may be made so large as to be prohibitive, where the occupation may be prohibited, although in such a case the fee ordinarily is deemed an exercise of the police power rather than of the taxing power."

This rule has been stated by this court. Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188.

In Nebraska Telephone Co. v. Lincoln, 117 N. W. 284, a levy of two per cent of gross earnings was upheld. A tax

of five per cent was sustained in Lincoln Traction Co. v. Lincoln, 121 N. W. 435. In City of St. Louis v. United Rys. Co., 174 S. W. 78, a tax was levied, and upheld, on each car [fol. 64] used for transporting passengers, at the rate of one mill for every passenger carried. A tax of two per cent on gross receipts was upheld in Southwestern Oil Co. v. State of Texas, 217 U. S. 114. In that case, quoting from Delaware Railroad Tax Cases, 18 Wall. 206, the court said:

"* * * 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction'."

We do not think the rate fixed by the ordinance is unreasonable, oppressive or confiscatory.

V. Appellant next contends that, under the act of Congress of July 24, 1866 (14 Statutes L. 221), it has the right to occupy the streets without the city's consent. Conceding this right, it does not impair the city's power to levy taxes on the beneficiaries of the act. In Williams v. Talladega, 226 U. S. 404, it is said:

"These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State."

The demurrer to the amended complaint was properly sustained, and the judgment is affirmed.

Blake, J. Main, J.

We concur.

Beals, C. J. Holcomb, J. Millard, J. Mitchell, J.

Tolman, J., took no part.

[fol. 65] IN SUPREME COURT OF WASHINGTON

No. 24327

DISSENTING OPINION

STEINERT, J., dissenting:

I cannot agree with either the reasoning or the result of the majority opinion. It is to be borne in mind that the case is before us on the amended complaint, a demurrer thereto which was sustained, and a judgment dismissing the action.

The amended complaint is too long to be set forth in its entirety; a brief summary of it must suffice. Its allegations may be reduced to the following statement: Appellant is a California corporation and as such has complied with the Laws of this state relating to foreign corporations. It owns and operates a telephone and telegraph system and does both an intrastate and interstate business. For the sake of convenience and adequate service to its patrons, it has divided the state of Washington into a number of exchange areas. The "Seattle exchange area" includes several thousand telephones outside the limits of the city of Seattle. Service between telephones within the same exchange area is designated "telephone exchange service"; the service between telephones located in different exchange areas is designated "telephone toll service". The company's accounts are kept in accordance with forms prescribed by the Interstate Commerce Commission and the Department of Public Works of Washington. The company has a central office equipment in Seattle having a value in excess of ten million dollars. Through its central office is rendered not only exchange service within the Seattle exchange, but also toll service, both intra-state and interstate. The company also has central office equipments in the other exchange areas throughout the state, aggregating in value about twenty million dollars. The company's business in the city of Seattle, according to the amended complaint, has at all times been conducted in an efficient and economical manner. Its net earnings derived [fol. 66] from its business in the Seattle exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of its property used and useful in

furnishing service within the exchange, were not in excess of 3.25%; its net earnings from business wholly within the city's limits were somewhat less. Subsequent to the first three months of 1932, the net earnings declined, and conditions existing at the time that the action was commenced indicate a probable further decline. The company has paid all its taxes for the years prior to 1931. In 1932 it paid taxes, for 1931, on its real estate inside the city, in the sum of $96,908.41, of which the city received $44,164.01 as its proportion. The company also paid $302,590.97 as the first half of 1931 personal property taxes, of which the city received $126,664.52. The remaining half became payable after this action had been commenced.

It is alleged in the amended complaint that the company was licensed by the state of Washington to engage in the telephone and telegraph business in and throughout the state, including the city of Seattle, for which license it paid the state, in 1932, a fee of $12,777.11; that the duty to give telephone service in Seattle and elsewhere in the state is a continuous one and cannot be terminated except with the consent of the state; and that for more than twenty-one months last past the company has not earned a fair return upon its property, and that the tax is arbitrary, unreasonable and confiscatory. The demurrer, of course, admits these allegations.

My first reason for dissent is that under the allegations of the amended complaint a prima facie case is stated. Not only is it directly alleged that the license fee is arbitrary, unreasonable and confiscatory, but sufficient facts to support the allegation, if it be considered as a mere conclusion, are also stated. We cannot disregard those facts or the issue tendered thereby. If the city can fix the rate at [fol. 67] four per cent, it can also fix it at ten. It is as easy to specify the one as it is the other. There is no innate virtue in the figure four, nor any inherent vice in the figure ten. We cannot say, nor are we privileged to say, dogmatically, that a fee of four per cent, as prescribed by the ordinance, is not unreasonable or confiscatory, or that a fee of ten per cent would be. It will require evidence, probably of an expert nature, to show what the actual situation is, and, until that evidence is produced, we cannot prejudge it. The demurrer should have been overruled for this reason alone, if for no other.

But I go further. The ordinance is not regulatory, but simply one for revenue. Not only does the ordinance declare it to be a revenue measure, but its very terms make no provision for regulation. This much is conceded in the majority opinion. The question then presents itself: Has the city the right to compel the company to obtain a license from it and to pay a tax or fee therefor before it can continue to carry on its business within the city?

Section 3 of the ordinance provides that after July 1, 1932, no person may engage in any business, occupation, pursuit or privilege for which a license fee or tax is imposed, without a license; that any taxpayer who carries on his business without such license shall be guilty of a violation of the ordinance for each day that the business is carried on or conducted. Section 24 provides that any person failing to comply with any of the provisions of the ordinance shall be guilty of a misdemeanor, punishable by a fine in any sum not to exceed three hundred dollars or by imprisonment in the city jail for a term not exceeding ninety days, or by both such fine and imprisonment.

If the city cannot compel the taking out of a license, then it cannot impose the tax. In the case before us the company had, under chapter 227, Laws of 1929, § 5, Rem. [fol. 68] Rev. Stat., § 3836-5, paid the state the sum of over twelve thousand dollars for the privilege of doing business in the state of Washington, for the year 1932. The privilege so obtained was comprehensive and subject to no limitations. The city could not give the company something that it already had; nor, conversely, could it take away or withhold a right that the company then possessed. The sovereign having granted the right, the city could not withdraw it. Since it could not take it away, it cannot hamper its exercise in the manner attempted. Mayor and Aldermen of Savannah v. Georgia, 36 Ga. 460; Reser v. Umatilla County, 48 Ore. 326, 86 Pac. 595; Cooley on Taxation, 4th Ed., § 1691. A license is simply the authority to conduct a business or pursue a calling, or the right conferred by the municipality which makes the pursuit lawful and without which it would be unlawful. The appellant having been authorized by the state to conduct its business within the state, the city cannot make that pursuit unlawful.

The majority opinion cites the following cases in support of the rule that cities and towns may impose taxes

either for revenue or regulation: Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652. Those cases do announce that rule, it is true, but neither they nor the rule therein announced are applicable here, for the reason that in none of those instances had the state previously granted the privilege. Consequently, the municipality there had the right to exact a license for the conduct of the business, and the payment of a tax therefor. If the parties did not care to engage in business on the terms exacted, they could either have refrained from entering upon it or else [fol. 69] withdrawn if they had already begun. The situation here is not at all comparable. The company cannot withdraw from the field but must continue to function; that was one of the considerations for which it was permitted to enter the state.

Approaching the matter from a somewhat different angle, I am of the view that the particular field of taxation had already been preempted by the state under chapter 113, Laws of 1921, Rem. Comp. Stat., § 10417, chapter 107, Laws of 1923, Rem. 1927 Sup., § 10417, both amended by chapter 107, Laws of 1929, Rem. Rev. Stat., §§ 10417-10419; and chapter 227, Laws of 1929, § 5, Rem. Rev. Stat., § 3836-5. The amending act of 1929 requires every public utility to file with the Department of Public Works an annual statement showing its gross operating revenues for the preceding year, and to pay a fee of one tenth of one per cent thereon. All such fees are required to be deposited in the public service revolving fund. The act makes the failure to pay such fees a misdemeanor punishable by a fine for each day's failure to pay. The last act requires all foreign corporations doing intra-state business in this state to pay certain fees for the privilege of doing such business. Those acts are, in my opinion, purely license acts and not regulatory. The funds derived therefrom are not devoted to the purpose of regulation, but, with the exception of the annual fees paid to the secretary of state, are required to be paid into the public service revolving fund, which is a general fund of the state subject to reappropriation by the legislature. The right to appropriate funds, under Art. VIII, § 4,

of the state Constitution, is recognized in State ex rel Bloedel-Donovan Lumber Mills v. Clausen, 122 Wash. 331, 211 Pac. 281, and State ex rel Shuff v. Clausen, 131 Wash. 119, 229 Pac. 5. The state having occupied the field of excise taxation, the city may not encroach upon it. We have here the same situation, in principle, as was presented in State ex rel Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, where the right of the state was declared supreme [fol. 70] and exclusive. The state having granted the privilege and having taxed it, the city could not thereafter exact an additional sum for the same privilege or right; otherwise, the municipality, by added exactions, could thwart the whole purpose of the state in admitting corporations to do a specific business therein on such terms as it saw fit to fix. The sovereign would be subsidiary to its various subdivisions. Cincinnati v. American Telephone & Telegraph Co., 112 Ohio St., 493, 147 N. E. 806; Firestone v. City of Cambridge, 113 Ohio St., 57, 148 N. E. 470; Cincinnati Oil Works v. City of Cincinnati, 123 Ohio St. 448, 177 N. E. 768.

Further, I think that the definition of "Gross Income", in the ordinance, is so vague and uncertain as to render the ordinance inoperative and void. By its provisions the ordinance is penal. Fine and imprisonment are the penalties for non-compliance. The taxpayer is entitled to know definitely and certainly the amount of tax which he is required to pay and the method of its ascertainment, without the expense of litigation necessary to determine either. Western Union Telegraph Co. v. Texas, 62 Tex. 630; State ex rel Crow, Attorney General, v. West Side Street Ry. Co., 146 Mo. 155, 47 S. W. 959; Standard Oil Co. v. State, 178 Ala. 400, 59 So. 667; Winslett v. Case-Fowler Lumber Co., 173 Ga. 539, 160 S. E. 364.

Looking at the terms of the ordinance, I do not see how the taxpayer could possibly determine the amount of tax to be paid by it, or the method of its ascertainment, without resort to litigation. Different and vitally conflicting views will arise out of the interpretation of its language. Section 2 of the ordinance reads as follows, with reference to the definition of income:

"Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business

engaged in, including rentals, royalties, fees or other emolu- [fol. 71] ments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

Does the word "value" as there used import "cost price", "sale price", or "net profit" on the sale of tangible property or service? If any one of these was intended, it could easily have been expressed. Again, the word "receipts" expressly excludes receipts or proceeds from the use or sale of real property. Appellant's equipment to the extent of millions of dollars is housed in, and in large part is permanently affixed to, buildings which are a part of the realty. Are the receipts from that source, pro tanto, to be deducted? Who shall say? How is anyone to know? It may confidently be assumed that the city will insist that no deductions are to be made in that respect. As confidently may it be assumed that the appellant will insist to the contrary. Many other questions are raised by the wording of this section, all of which lead to confusion in the attempt to interpret them. The majority opinion says that the definition of "Gross Income" in the present ordinance is substantially the same as that contained in the act of West Virginia, considered and sustained in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. I do not so read it. That act provided that persons engaging in certain businesses should pay a tax "equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided) multiplied by the respective rates". The language is not only entirely different, but upon its very face it shows that the tax is to be computed on the gross sales of the products. No such certainty or definiteness appears here. The rule by which the tax is to be measured should be definite and certain, and its definiteness and certainty should appear from its provisions [fol. 72] and not be the product of either litigation or compromise.

For the reasons suggested, and rather briefly stated in the light of the extended discussion in the briefs, I dissent.

Steinert, J.

[fol. 73] IN SUPREME COURT OF WASHINGTON

En Banc

No. 24330

SEATTLE GAS COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, Respondent

OPINION—Filed April 21, 1933

Per CURIAM:

This is an appeal from a judgment dismissing an action brought to enjoin the enforcement of a tax imposed upon appellant under ordinance No. 62,662, of the city of Seattle. The same questions are raised as in the cases of Pacific Telephone & Telegraph Co. v. Seattle, — Wash. Dec. —, and Puget Sound Power & Light Co. v. Seattle, — Wash. Dec. —. For the reasons stated in those cases, the judgment entered herein is affirmed.

[fol. 74] IN SUPREME COURT OF WASHINGTON

No. 24330

DISSENTING OPINION

STEINERT, J., dissenting:

For the reasons already stated by me in Pacific Telephone & Telegraph Co. v. City of Seattle, — Wash. Dec. —, — P. (2d) —, and Puget Sound Power & Light Co. v. City of Seattle, — Wash. Dec. —, — P. (2d) —, I dissent.

Steinert, J.

[fol. 75] In Supreme Court of Washington, Department —

No. 24330

Seattle Gas Company, Appellant,

vs.

The City of Seattle, Respondent

Order Denying Rehearing—Filed June 14, 1933

The court having considered the appellant's petition for a rehearing herein;

It is ordered that the said petition be and it hereby is denied.

Dated this 14 day of June, 1933.

By the Court:

Walter B. Beals, Chief Justice.

[File endorsement omitted.]

[fol. 76] In Supreme Court of Washington

No. 24330

Seattle Gas Co., Appellant,

vs.

The City of Seattle et al., Respondents

Judgment—June 14, 1933

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 14th day of June, A. D. 1933, on motion of A. C. Van Soelen, C. V. Hoard & W. L. Baumgartner, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said The City of Seattle et al. have

and recover of and from the said Seattle Gas Company and from Glens Falls Indemnity Co. surety the costs of this action taxed and allowed at Seventy-Three & 15/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 77] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

#24330

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed June 19, 1933

The petitioner, Seattle Gas Company, a Washington corporation, hereby respectfully shows that on the 14th day of June, 1933, the Supreme Court of the State of Washington, sitting at Olympia, Washington, made and entered a final decision and judgment in the above entitled cause affirming the judgment of the Superior Court of the State of Washington, for King County, in favor of the appellee and against your petitioner; that the Supreme Court of the State of Washington is the highest court of said state in which a decision in said matter can be had.

Considering itself aggrieved by said final decision, the appellant, Seattle Gas Company, hereby prays that an appeal be allowed to the Supreme Court of the United States from said judgment and decision, and that said appeal shall operate as a supersedeas and shall suspend and stay the operation and enforcement of said judgment and decision, and shall suspend and *and* stay the enforcement of [fol. 78] Ordinance No. 62,662 of the City of Seattle, or any part thereof, against appellant during the pendency of said appeal, and for an order fixing the amount of the bond thereof.

Assignment of Errors

Comes now the appellant, Seattle Gas Company, and assigns as error:

1. That the Supreme Court of the State of Washington erred in refusing to reverse the judgment of the Superior Court of the State of Washington for King County.

2. That the Supreme Court of the State of Washington erred in holding that the provisions of Ordinance No. 62,662 of the City of Seattle, in so far as they apply to appellant, do not abridge the rights of appellant, Seattle Gas Company, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. That the Supreme Court of the State of Washington erred in holding that said Ordinance No. 62,662, which imposes a tax of 3% upon appellant's gross revenues from the business of selling gas in the city of Seattle and neglects to impose the same or similar tax upon the electric business of the appellee owned and conducted by the appellee in said City of Seattle, is not discriminatory and confiscatory and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States. The tax so imposed is for revenue purposes only, and the appellee, The City of Seattle, owns and operates its electric business solely in its private or proprietary [fol. 79] capacity and in the operation of said business in no sense exercises any of its governmental functions.

4. That the Supreme Court of the State of Washington erred in holding that although the appellant sells gas to the inhabitants of the City of Seattle for the same uses and purposes for which the appellee in its proprietary capacity sells such inhabitants electricity, and that though their businesses are highly competitive, the appellee may lawfully exempt itself from taxation and tax appellant 3% upon its gross revenues, as is done by said Ordinance No. 62,662, and that said ordinance does not deny appellant the equal protection of the law and deprive it of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

5. That the Supreme Court of the State of Washington erred in holding that under the facts of this case, the tax imposed upon appellant by said Ordinance No. 62,662 does not constitute an appropriation and illegal taking of appellant's property without compensation, and does not de-

prive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, even though the City of Seattle could and did by said ordinance actually impose upon itself the same tax which by said ordinance it attempts to impose upon appellant.

6. That the Supreme Court of the State of Washington erred in refusing to hold that said Ordinance No. 62,662, under the conceded facts of this case, is repugnant to the Fourteenth Amendment to the Constitution of the United [fols. 80–89] States because it is an illegal attempt by the City of Seattle to exercise its governmental power of taxation to confiscate appellant's property in aid of appellee's proprietary and private business of selling electricity to the inhabitants of the city of Seattle in competition with appellant who sells them gas for the same or similar purposes, and in not holding that the design or effect of said ordinance is to eliminate appellant as a competitor of the City of Seattle.

7. That the Supreme Court of the State of Washington erred in holding that said Ordinance No. 62,662 of the City of Seattle does not constitute an impairment of the appellant's franchise contract rights, in contravention of Article I, Section 10, of the Constitution of the United States.

8. That the Supreme Court of the State of Washington erred in refusing to hold that the ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United States in that said ordinance, and particularly the definition of "gross income" in Section 2 thereof is vague, indefinite and uncertain.

Prayer For Reversal

For which errors appellant prays that the said judgment and decision of the Supreme Court of the State of Washington, dated June 13, 1933, be reversed and a judgment and decree entered in favor of appellant as prayed in its amended complaint, and for costs.

C. K. Poe, A. J. Falknor, Judson F. Falknor, DeWolfe Emory, Counsel for Appellant.

[fol. 90] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

24330

SEATTLE GAS COMPANY, a Corporation, Appellant,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, Appellee

ORDER ALLOWING APPEAL—Filed June 19, 1933

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Washington on the 14th day of June, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided,

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the above entitled cause as provided by law, and that upon the execution of a bond in the total penalty of Ten Thousand & no/100 Dollars ($10,000), One Thousand Dollars ($1,000.00) of which amount is security for costs on appeal, said appeal shall operate as a supersedeas and shall suspend and stay the return of the remittitur herein from the Supreme Court of the State of Washington to the Superior Court of King County, Washington, and the enforcement of Ordinance No. [fol. 91] 62,662, of the City of Seattle or any part thereof against appellant until the final determination of said appeal, and

It is further ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record, proceedings and judgment in this cause, in accordance with Rule 10 of the Revised Rules of the Supreme Court of the United States, and transmit the same to the Supreme Court of the United States, so that he

shall have the same in said court within sixty (60) days of this date.

Dated this 19th day of June, 1933.

Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington.

[fols. 92 & 93] Supersedeas bond on appeal for $10,000, approved and filed June 19, 1933, omitted in printing.

[fols. 94 & 95] Citation, in usual form, showing service on A. C. Van Soelen, filed June 22, 1933, omitted in printing.

[fol. 96] IN SUPREME COURT OF WASHINGTON

No. 24330

[Title omitted]

ACKNOWLEDGEMENT OF SERVICE—Filed June 22, 1933

Due service of the following papers touching the appeal of the appellant to the Supreme Court of the United States is hereby acknowledged, to wit:

1. Petition for Appeal, Assignment of Errors and Prayer for Reversal.
2. Order Allowing Appeal.
3. Statement as to Jurisdiction on Appeal.
4. Citation.
5. Notice Directing Attention to Rule 12 United States Supreme Court Rules.
6. Bond on Appeal.
7. Præcipe for Transcript on Appeal.

City of Seattle, by A. C. Van Soelen, Corporation Counsel, by Walter L. Baumgartner, Assistant.

[File endorsement omitted.]

[fol. 97] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24330

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 22, 1933

To the Clerk of the above-entitled court:

Please prepare a transcript of record on appeal of the above entitled cause to the Supreme Court of the United States, including therein the following papers and documents:

1. Amended Complaint.
2. Demurrer to Amended Complaint.
3. Judgment and decree of Dismissal including Notice of Appeal endorsed thereon.
4. Bond on Appeal to the Supreme Court of the State of Washington.
5. Certificate of Clerk of the Superior Court.
7. Opinion of the Supreme Court of the State of Washington in: (a) Puget Sound Power & Light Co., appellant, vs. City of Seattle, No. 24296; (b) Pacific Telephone & Telegraph Company v. City of Seattle, No. 24327; (c) Seattle Gas Company vs. City of Seattle, No. 24330.
8. Order Denying Petition for Rehearing.
9. Judgment and Decree of the (Superior) Court of the Supreme State of Washington.
10. Petition for Appeal, Assignment of Errors and Prayer for Reversal.
11. Statement as to Jurisdiction of the Supreme Court of the United States.
12. Order Allowing Appeal and Fixing Supersedeas Bond.
13. Supersedeas Bond.
14. Citation.

[fol. 98] 15. Statement Directing Attention to Rule 12 United States Supreme Court Rules.

16. Proof of Service of Papers Required by Rule 12 United States Supreme Court Rules.

17. Præcipe for Transcript on Appeal.
18. Clerk's Certificate.

Poe, Falknor, Falknor & Emory, Attorneys for Appellant.

Service of the foregoing Præcipe by receipt of a true copy thereof is hereby acknowledged this 20 day of June, 1933.

City of Seattle, by A. C. Van Soelen, Corporation Counsel, by Walter L. Baumgartner, Assistant.

[fol. 99] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 100] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Aug. 28, 1933

(Pursuant to Rule 13 (9))

C. K. Poe, A. J. Falknor, Judson F. Falknor, DeWolfe Emory, Attorneys for Appellant.

Copy of within received Aug. 25, 1933.

A. C. Van Soelen, Corporation Counsel.

[fol. 101] Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Seattle, Washington, this 24th day of August, 1933.

C. K. Poe, A. J. Falknor, Judson F. Falknor, DeWolfe Emory, Attorneys for Appellant.

Due service of the foregoing Statement of Points and Designation of Parts of Record to be Printed, together with the receipt of a true copy thereof, is hereby acknowledged this 25th day of August, 1933.

—— ——, Corporation Counsel, Attorney for City of Seattle, Appellee Herein.

[fol. 102] [File endorsement omitted.]

Endorsed on cover: File No. 37,962. Washington Supreme Court. Term No. 359. Seattle Gas Company, appellant, vs. The City of Seattle. Filed August 18, 1933. No. 359, O. T., 1933.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	1
Statute of the State the validity of which is involved	2
Date of the judgment sought to be reviewed and date upon which application for appeal was presented	5, 6
Nature of case and ruling below	6
Cases believed to sustain jurisdiction	9

Table of Cases Cited.

Eclipse Mill v. Department of Labor & Industries, 277 U. S. 135	9
King Mfg. Co. v. Augusta, 277 U. S. 100	9

Statutes Cited.

Act of January 31, 1928, as amended by the Act of April 26, 1928 (28 U. S. C. A. 861a)	2
Constitution of the United States, Article I, Section 10	8
14th Amendment	8, 9
Judicial Code, Section 237, as amended by the Act of February 13, 1925, Section 1 (43 Stat. 937)	1
Ordinance No. 62062 of the City of Seattle, Section 1	2
Section 2	2
Section 3	3
Section 5	4
Section 6	4
Section 15	4
Section 16	5
Section 24	5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 359

SEATTLE GAS COMPANY, A CORPORATION, APPELLANT,

vs.

THE CITY OF SEATTLE, A MUNICIPAL CORPORATION, APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Section 1 (43 Stat. 937), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "SEC. 237. A final judgment or decree in any suit in the highest court of a state in which a decision in a suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or

laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may in its discretion award execution or remand the cause to the court from which it was removed by the writ."

Under the Act of January 31, 1928, as amended by the Act of April 26, 1928, the writ of error was abolished and appeal is now the proper remedy (U. S. C. A., Title 28, Sec. 861*a*; Supreme Court Rule No. 46).

B.

Statute of the State the Validity of Which is Involved.

The validity of a taxing ordinance of the City of Seattle, a municipal corporation, existing under and by virtue of the laws of the State of Washington is involved. The ordinance is numbered 62662. The pertinent provisions thereof are:

"ORDINANCE No. 62662.

An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

Be it ordained by the City of Seattle as follows:

SECTION 1. *Exercise of Revenue License Power.*—The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

SECTION 2. *Definitions.*—In construing the provisions of this ordinance, save when otherwise plainly

declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income.—The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like), and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

* * * * * * *

SECTION 3. '*Occupation License*' *Required.*—After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

* * * * * * *

SECTION 5. *Occupation Subject to Tax—Amount.*—There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against the gross income, as follows:

(*a*) • • •

(*b*) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

• • • • • • •

SECTION 6. *City of Seattle Subject to Tax.*—Subdivisions (*b*) and (*c*) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

• • • • • • •

SECTION 15. *Taxpayer to Keep Books and Records—Returns Confidential.*—It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the city comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the city comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the mayor, the corporation

counsel, the city comptroller, or his authorized agent, and members of the city council.

SECTION 16. *Comptroller to Investigate Returns.*—If any taxpayer fails to apply for license or make his return, or if the city comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpœna to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpœna, require him, or any person, to bring with him such books, records and papers as may be necessary.

* * * * * * *

SECTION 24. *Penalty.*—Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the city comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the city jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

C.

The date of the judgment sought to be reviewed is June 14th, 1933.

The petition for allowance of an appeal is presented on the 19th day of June, 1933.

D.

Nature of Case and Ruling Below.

The appellant, Seattle Gas Company, as plaintiff brought the action in the Superior Court of the State of Washington for King County, to enjoin defendant, The City of Seattle, from collecting from appellant the license tax prescribed by Ordinance No. 62,662, and to restrain any attempt by the city to enforce the ordinance and its penalties against appellant; and (2) to recover from appellee the sum of $5,500.66, with interest upon the sum of $1,000 at the rate of 6 per cent per annum from July 1, 1932, and upon the further sum of $4,500.66 at said rate of interest from July 11, 1932, which amount appellant paid to appellee as the first monthly installment of the ordinance tax.

The case was decided upon a demurrer interposed by appellee to the amended complaint, and the complaint alleged, among other things:

That appellant is a public utility corporation organized under the laws of the State of Washington and as such since 1904 has been and is engaged in the manufacture and sale of gas in the City of Seattle and adjacent territory (Paragraph I).

That appellant was at all times mentioned in the complaint the lawful owner and holder of two operating franchises granted by the City of Seattle, both of which are in full force and effect, and under each of which appellant is authorized to sell gas to the inhabitants of the City of Seattle and to construct, maintain and operate the necessary apparatus and equipment (Paragraph VII).

That appellee is a municipal corporation of the State of Washington. In its proprietary capacity and for profit, it

has for many years been engaged in the business of selling and furnishing electric light and power to the inhabitants of the City of Seattle for the same purposes for which the appellant sells gas, all in strict and keen competition with appellant (Paragraphs II and VII).

The appellee has sole and exclusive power to fix and determine the rates at which it sells electricity to its customers and is in no wise regulated by the State of Washington or its department of public works (Paragraph III).

On the other hand, appellant is subject to the exclusive control and regulation of the department of public works (Paragraphs III and IV).

The property of the appellee used by it in its electric business is exempt from all city, county and State taxes (Paragraph III).

Appellant is required to pay annual taxes for State, county and city purposes upon all of its property, including its franchises granted by the appellee used in its business in the amount of many thousands of dollars (Paragraph IV).

The appellee at all times mentioned in the complaint has been actively engaged in soliciting customers, actual or potential, of the appellant to cease the use and purchase of gas from appellant and to substitute therefor electricity sold by the appellee, by reason of which appellant is obliged to sell and supply more heat units at a given price than are supplied by the appellee to the public for the same price (Paragraph V).

The City of Seattle has financed its proprietary electric light and power business by the sale of revenue bonds in amounts in excess of thirty million dollars. The principal and interest of said bonds are payable only out of the gross revenues of the city's light and power business. Such bonds are by the law of the State of Washington and by the ex-

press terms of each of said bonds prior liens upon the city's entire gross revenue from its light and power business—taking precedence even over operating charges (Paragraph IX).

After alleging the enactment of Seattle Ordinance No. 62,662 (Paragraph XII) and the payment by appellant under protest of the first monthly installment that would be due thereunder if said ordinance were valid and enforceable as to appellant, the amount of said monthly payment being $5,500.66, it is alleged that by said ordinance appellee is not required to pay the license fee or tax therein specified out of revenues received by appellee from its proprietary business of selling electric light and power, or at all, and that the ordinance is in no respect enforceable against appellee (Paragraph XIV) and does not impose any such tax upon appellant's competitor, namely, the City of Seattle.

The validity of the ordinance in its application to appellant was challenged *inter alia* upon the following grounds:

Appellant charged that under the facts alleged, in its application to appellant, the ordinance (1) would be repugnant to the Fourteenth Amendment to the Constitution of the United States in that the enforcement thereof against appellant would deny appellant equal protection of the law and deprive appellant of its property without due process of law; and (2) would be repugnant to Article I, Section 10, of the Constitution of the United States, in that such application to appellant would impair the obligation of the operative franchise contracts between appellant and appellee; and (3) would constitute an oppressive and confiscatory exercise by appellee of a governmental power of taxation in aid of its proprietary business of selling electric light and power for profit; and (4) would constitute an appropriation and would result in a spoliation of plaintiff's

property without compensation; and (5) would constitute unlawful and oppressive discrimination in that the ordinance tax would be exacted of appellant but would not be exacted of appellant's competitior, the City of Seattle, which is engaged in highly competitive business in a proprietary capacity for profit.

The validity of the ordinance was also challenged as repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States because Section 2 of the ordinance, and particularly the definition of "gross income" therein, is vague, indefinite and uncertain with respect to the amount of the tax to be paid and the method by which the amount may be ascertained to an extent that men of "common intelligence must necessarily guess at its meaning and differ as to its application."

Appellee demurred to appellant's amended complaint. The trial court sustained the demurrer and entered a judgment dismissing plaintiff's action. Upon appeal by plaintiff to the Supreme Court of Washington, which is the highest court in the State of Washington in which a decision in the suit could be had, the validity of the ordinance was by said court sustained and the judgment entered by the trial court was affirmed.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

King Mfg. Co. v. *Augusta*, 277 U. S. 100;

Eclipse Mill v. *Department of Labor & Industries*, 277 U. S. 135.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

Respectfully submitted,

C. K. Poe,
A. J. Falknor,
Judson F. Falknor,
DeWolfe Emory,
Counsel for Appellant.

(3799)

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DEC 18 193

CHARLES ELMORE C

No. 359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

SEATTLE GAS COMPANY, a corporation,
Appellant,

vs.

CITY OF SEATTLE, a municipal corporation,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Appellant

C. K. POE,
A. J. FALKNOR,
J. F. FALKNOR,
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Seattle, Washington.

IVY PRESS, SEATTLE

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SUBJECT INDEX.

Page

Opinion Below 3

Jurisdiction 4

Statement 4

Questions Presented to the Supreme Court of Washington 12

Specification of Errors 13

Summary of Argument 16

ARGUMENT:

1 and 2. Ordinance 62662 of the City of Seattle denies appellant the equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States, as it imposes an unjust tax upon appellant which is not imposed upon the City of Seattle, which conducts a competing electric business in its private capacity 17

The ordinance is designed to foster the City's electric business and destroy its competitors 17

3. The ordinance requires appellant to procure and pay for a license on pain of fine and imprisonment to do precisely what it is authorized to do under its franchise in contravention of Section 10 of Article I of the Constitution of the United States 22

4. The ordinance is repugnant to the Fourteenth Amendment in that Section 2 thereof is so vague that the amount of tax exacted cannot be definitely computed 25

TABLE OF CASES AND STATUTES

Page

UNITED STATES SUPREME COURT CASES:

Educational Film Corporation vs. Ward, 282 U. S. 379 19

McCallen vs. Massachusetts, 279 U. S. 620 19

Los Angeles vs. Los Angeles Gas & Electric Co., 251 U. S. 32 23

New York Electric Line vs. Empire City Subway Co., 235 U. S. 179 23

Conally vs. General Construction Co., 269 U. S. 385 25

Champlin Refining Co. vs. Corporation Comm. of Okla., 286 U. S. 210 25

International Harvester Corp. vs. Kentucky, 234 U. S. 216, 222 25

Collins vs. Kentucky, 234 U. S. 634, 638 25

United States vs. Cohen Grocery Co., 255 U. S. 81 25

Small Company vs. American Sugar Refining Co., 267 U. S. 233 25

Cline vs. Frink Dairy Co., 274 U. S. 445, 455 .. 25

Smith vs. Cahoon, 283 U. S. 553 25

CASES FROM FEDERAL COURTS:

Lincoln Gas & Electric Co. vs. City of Lincoln, 182 Fed. 926, 929 18

Los Angeles Gas & Electric Co. vs. City of Los Angeles, 241 Fed. 912, 918 19

CASES FROM WASHINGTON SUPREME COURT:

Pacific Telephone & Telegraph Co. vs. Seattle (R. 45) 4

TABLE OF CASES AND STATUTES—Continued

Page

Puget Sound Power & Light Co. vs. Seattle (R. 35) 4

Seattle Gas Co. vs. Seattle (R. 59) 4

CASES FROM OTHER STATES:

City vs. Lincoln Gas & Electric Light Co., 158 N. W. 962 18

Hot Springs Elec. Co. vs. Hot Springs, 70 Ark. 300, 67 S. W. 761 23

State vs. Humble Pipe Line Co., 112 Texas 373, 247 S. W. 1082, 1083 26

Attorney General vs. West Side Street R. R. Co., 146 Mo. 145, 155, 47 S. W. 959, 961 26

STATUTES OF THE STATE OF WASHINGTON:

Remington's Revised Statutes, Sec. 10362 10

Remington's Revised Statutes, Sec. 9491 11

No. 359

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CITY OF SEATTLE, a municipal corporation,
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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Appellant

OPINION OF THE COURT BELOW.

In this case the Supreme Court of the State of Washington rendered a *per curiam* opinion, which appears in the record at page 59. The opinion states that the same questions are raised in the cases of

Pacific Telephone & Telegraph Company vs. Seattle and *Puget Sound Power & Light Company vs. Seattle* and for the reasons stated in those opinions entered the judgment from which this appeal is taken.

The opinion in the Telephone case appears in the record at page 45 and in the Puget Sound Power & Light Company case at page 35.

The official report of these cases has not been published but will probably appear in Vol. 172 of the Washington reports.

JURISDICTION.

The judgment to be reviewed is dated June 14, 1933 (R. 60). The grounds upon which jurisdiction of this court is invoked are fully set forth in the statement as to jurisdiction, which is separately printed.

STATEMENT.

This appeal involves the validity and constitutionality of Ordinance No. 62662 of the City of Seattle, by which the appellee seeks to impose an occupation tax upon appellant equal to 3 per cent of its total gross income from selling or furnishing gas in the City of Seattle. Recognizing the obscure and unintelligible terms of the ordinance and the impos-

sibility of determining therefrom with any degree of exactitude how its total gross income could be determined or computed, the appellant (nevertheless fearing the extreme penalties imposed) filed a return and paid the first installment of said tax under protest. Immediately thereafter it brought this suit to recover the installment so paid and to enjoin the further enforcement of the ordinance. The city interposed a general demurrer to the amended complaint, which the trial court sustained. Appellant having elected to stand upon its amended complaint, judgment of dismissal was entered and upon appeal to the Supreme Court of the State of Washington that judgment was sustained. The demurrer, of course, admits all facts well pleaded and the complaint must be read in the light of the well established principle that a taxing act must be construed strictly in favor of the taxpayer and against the sovereign. The relevant portions of the ordinance are these:

"ORDINANCE No. 62662.

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. *Exercise of Revenue License Power:* The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. *Definitions:* In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

GROSS INCOME: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Section 3. *'Occupation License' Required:* After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 5. *Occupation Subject to Tax—Amount:* There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(a) * * * * *

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) * * * * *

* * * * * *

Section 6. *City of Seattle Subject to Tax:* Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City

of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

* * * * * *

Section 15. *Taxpayer to Keep Books and Records—Returns Confidential:* It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16. *Comptroller to Investigate Returns:* If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place

for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

* * * * * *

Section 24. *Penalty:* Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

The amended complaint (R. 1) alleges in substance that the appellant is a domestic corporation, engaged in the manufacture and sale of gas to the inhabitants of Seattle and certain portions of King County for illuminating, cooking, heating, manufacturing and many other purposes for which the appellee sells electricity in strict and keen competition with the appellant. The activities are carried on by appellant under two franchises granted by the City which are described by title and number. The City conducts its electrical business in its proprietary, as distinguished from its governmental, capacity; it is unregulated as to rates, rules and practices and

pays no taxes. On the other hand, appellant is under the exclusive jurisdiction of the Department of Public Works, which regulates its rules, rates and practices. (Rem. Revis. Stat. of Wash., Sec. 10362.) It pays annual taxes for state, county and city purposes on all its property, including said franchises. The City, in the conduct of its business, is actively engaged in soliciting appellant's customers, actual and potentional, to use electricity instead of gas and in order to retain its customers appellant is obligated to sell more heat units at a given price than are supplied by the City for the same price. Since the imposition of the Occupation Tax, the City has not increased its rates so that it may pay itself the tax the ordinance purports to impose against it, and it is stated inferentially that the rates charged by the City automatically regulate the rates which appellant may charge.

That the City may not now impose or burden appellant's franchise rights by requiring it to procure and pay for the additional license which the ordinance requires.

That the City has from time to time issued general lien bonds for constructing and extending its electric light plant and system, of which there are now the principal amount of approximately $1,447,-

000.00 outstanding. In addition to this, revenue bonds were issued by the City from time to time of which $32,852,000.00 are now outstanding.

Under Section 9491 of Remington's Revised Statutes, these revenue bonds are obligations argainst only the gross revenue received from the sale of electric light and power by the City and all such gross revenues are by law and the various ordinances under which the revenue bonds were issued from time to time pledged to the payment of the principal and interest of said bonds, which pledge constitutes a charge upon said gross revenue prior and superior to all other charges whatsoever, including charges for maintenance and operation.

It is further alleged that the City is not obligated to pay the license fee or tax which the ordinance under attack purports to impose upon it and that the terms of said ordinance are not enforceable against the City. That in truth and in fact the City has not paid the license fee or tax specified in said ordinance and has no legal authority to pay the same.

It is also alleged that under duress and coercion and in order to enable appellant in a lawful manner to contest the validity of said ordinance, appellant, under protest, paid the first installment of the tax imposed, which amounted to $5,500.66.

QUESTIONS PRESENTED TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

The only questions presented below which we are now urging may be concisely stated as follows:

1. Does the 3 per cent license tax imposed upon appellant by Ordinance No. 62662 of the City of Seattle deprive appellant of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that a similar burden is not imposed upon the municipal electric plant which the City conducts in its private capacity in keen competition with the gas business conducted by the appellant under its franchises?

The Supreme Court of the State of Washington held that it did not.

2. Can the City of Seattle, without violating the due process and equal protection clauses of Section 1 of the Fourteenth Amendment, tax appellant 3 per cent of its gross income from the sale of gas and not impose a like tax upon the gross income from its privately owned electric plant?

The Supreme Court of the State of Washington held that it could.

3. Whether under the facts of this case said ordinance constitutes an impairment of appellant's contractual franchise rights in contravention of Section 10 of Article I of the Constitution of the United States.

The Supreme Court of the State of Washington held that it did not.

4. Whether the definition of "gross income" contained in Section 2 of the ordinance is so vague and uncertain that its attempted enforcement against appellant would violate the Fourteenth Amendment.

The Supreme Court of the State of Washington held that it is not.

SPECIFICATION OF ERRORS.

1. That the Supreme Court of the State of Washington erred in holding that the provisions of Ordinance No. 62662 of the City of Seattle, in so far as they apply to appellant, do not abridge the rights of appellant, Seattle Gas Company, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. That the Supreme Court of the State of Washington erred in holding that said Ordinance No. 62662, which imposes a tax of 3 per cent upon ap-

pellant's gross revenues from the business of selling gas in the City of Seattle and neglects to impose the same or similar tax upon the electric business of the appellee owned and conducted by the appellee in said City of Seattle, is not discriminatory and confiscatory and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States. The tax so imposed is for revenue purposes only, and the appellee, The City of Seattle, owns and operates its electric business solely in its private or proprietary capacity and in the operation of said business in no sense exercises any of its governmental functions.

3. That the Supreme Court of the State of Washington erred in holding that although the appellant sells gas to the inhabitants of the City of Seattle for the same uses and purposes for which the appellee in its proprietary capacity sells such inhabitants electricity, and that though their businesses are highly competitive, the appellee may lawfully exempt itself from taxation and tax appellant 3 per cent upon its gross revenues, as is done by said Ordinance No. 62662, and that said ordinance does not deny appellant the equal protection of the law and deprive it of its property without due process of

law, in violation of the Fourteenth Amendment to the Constitution of the United States.

4. That the Supreme Court of the State of Washington erred in holding that under the facts of this case, the tax imposed upon appellant by said Ordinance No. 62662 does not constitute an appropriation and illegal taking of appellant's property without compensation, and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, and even though the City of Seattle could and did by said ordinance actually imposed upon itself the same tax which by said ordinance it attempts to impose upon appellant.

5. That the Supreme Court of the State of Washington erred in refusing to hold that said Ordinance No. 62662, under the conceded facts of this case, is repugnant to the Fourteenth Amendment to the Constitution of the United States because it is an illegal attempt by the City of Seattle to exercise its governmental power of taxation to confiscate appellant's property in aid of appellee's proprietary and private business of selling electricity to the inhabitants of the City of Seattle in competition with appellant who sells them gas for the same or similar purposes, and in not holding that the design or effect

of said ordinance is to eliminate appellant as a competitor of the City of Seattle.

6. That the Supreme Court of the State of Washington erred in holding that said Ordinance No. 62662 of the City of Seattle does not constitute an impairment of the appellant's franchise contract rights, in contravention of Section 10 of Article I of the Constitution of the United States.

7. That the Supreme Court of the State of Washington erred in refusing to hold that the ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United tates in that said ordinance, and particularly the definition of "gross income" in Section 2 thereof is vague, indefinite and uncertain.

SUMMARY OF ARGUMENT.

The tax imposed by the ordinance is confiscatory, takes appellant's property without compensation and deprives it of its property and property rights without due process of law because:

1. The City is seeking to exercise the governmental power of taxation in order to advance the interests of the electric business which it conducts in its proprietary capacity and thus destroy appellant as a competitor.

2. The attempt by the City to equalize and legalize the tax by imposing a similar tax upon its own business was but an idle gesture and wholly void.

3. The imposition of the tax impairs the contract obligations created by appellant's franchises and requires appellant to pay for a license, to do precisely what its franchises authorize, imposes additional and erroneous burdens upon the franchises and grants no additional privileges.

4. The definition of "gross income" contained in the ordinance is so vague and indefinite that the amount of tax sought to be imposed cannot be ascertained with reasonable certainty.

ARGUMENT.

I AND II.

THE TAX IS CONFISCATORY AND VOID BECAUSE THE CITY IS SEEKING TO EXERCISE THE GOVERNMENTAL POWER OF TAXATION TO DESTROY APPELLANT AS A COMPETITOR.

The complaint alleges and the demurrer admits that appellant and appellee are competitors in that the one sells gas and the other electricity to the same class of customers for the same uses and purposes. The uses to which their product is put are in most cases identical.

It has been judicially decided that these businesses are too similar to be classified differently for taxation purposes.

> "This occupational tax I think invalid, as violating the Constitution of the State of Nebraska, requiring it to be uniform upon persons and property. In my judgment, an electric plant, which furnishes to the public light, heat, and power should be classed the same as a gas plant, which furnishes to the public light, heat, and power. The fact that one furnishes the light, heat and power by means of an electric current—the other by a current of gas—does not, in my judgment, justify a difference in classification. So far as the patrons are concerned, it is results that are sought for, and it is results which the respective parties furnish the public—results being light, heat, and power."
>
> *Lincoln Gas & Electric Co. vs. City of Lincoln*, 182 Fed. 926, 929.
>
> *City vs. Lincoln Gas & Electric Light Co.*, 158 N. W. 962.

It is further alleged that because of this competition appellant is obliged to supply more heat units per dollar than the City. This obviously shows that the price charged by the City automatically fixes appellant's rates and charges. It follows that where the City as sovereign imposes tax burdens upon appellant's business which are not equally imposed upon its own competing private utility business that it thereby starts a process of confiscation which must

ultimately result in the wrongful seizure and uncompensated taking of appellant's property without due process of law.

It is attempting, through the process of taxation, to destroy appellant's utility in order to foster its own. This, we submit, cannot be done.

> "In other words, when acting clearly within the domain of its private and proprietary capacity, the city may not *draw sustenance or power* to itself through an assumption of public and governmental functions."
>
> *Los Angeles Gas & Electric Co. vs. City of Los Angeles*, 241 Fed. 912, 918.

The effect and not the form of a tax is the ground upon which its validity should be tested.

> *Educational Film Corporation vs. Ward*, 282 U. S. 379.
>
> *McCallen vs. Massachusetts*, 279 U. S. 620.

In the conduct of its business of operating an electric plant, the City is engaged in a private capacity and the ordinance attacked is in no sense a police measure.

In the opinion in *Puget Sound Power & Light Company vs. Seattle*, which is by reference adopted as part of the opinion in this case, it is said (R. 37):

> "The city, in its proprietary capacity, is in competition with appellant in the power and light

business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind, the city council, by virtue of Sec. 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though Sec. 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom."

This quotation, we submit, decides at least two propositions which are binding on this court:

(a) The City in the conduct of its electric plant is acting in a proprietary capacity;

(b) That the City lacks authority to impose the tax upon itself which it pretended to impose by Section 6 of the ordinance.

It also recognizes how burdensome, if not destructive of appellant's business, the imposition of the tax will be if the City escapes a like burden. In other words, the tax creates an abnormal, unfair and revolutionary competition which no business can stand. For that reason it is confiscatory and deprives appellant of the protection of the Fourteenth Amendment to the Constitution of the United States.

We submit on the point at issue little can be added to what Judge Steinert says in his dissenting opinion (R. 43):

> "The crowning reason, in my opinion, for holding the ordinances inoperative and void as to this appellant is that it constitutes an unlawful exercise of the city of a governmental power in aid of its proprietary business. The city is a competitor of the appellant. Both are engaged in a similar business for profit. The appellant's franchise is not exclusive, hence it can not complain of competition. It may not even complain if the city should see fit to appropriate its property for public use by condemnation. But so long as appellant is permitted to function as a competitor, its property may not be taken from it without due process of law, and that, in effect, is just what the ordinance does. The validity of the tax must be determined by its true operation and effect on the basis of the results which follow its operation. *Aberdeen Savings & Loan Assn. vs. Chase,* 157 Wash. 351, 289 Pac. 536; *Educational Films Corp. vs. Ward,* 282 U. S. 379, 75 L. Ed. 400."

To sum the argument, it is obvious that if the tax is sustained the City will in a short while not only have acquired appellant's business through an unfair process of elimination but also have received an annual tax of some $60,000.00 by way of a bonus for destroying it.

III.

The Imposition of the Tax Impairs the Contract Obligations Created by Appellant's Franchises and Requires Appellant to Pay For a License to Do Precisely What Its Franchises Authorize, Imposes Additional and Erroneous Burdens Upon the Franchises and Grants No Additional Privileges.

Appellant's franchises are contracts and license it to conduct the very business to which the ordinance is directed, i. e., "carry on the business of selling or furnishing gas" (quotation from ordinance).

> "A franchise conveys rights, and if their exercise could be prevented or destroyed by simple declaration of a municipal council, they would be infirm, indeed, in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are intended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without

the proper process of law—the payment of compensation."

Los Angeles vs. Los Angeles Gas & Electric Co., 251 U. S. 32.

New York Electric Line vs. Empire City Subway Co., 235 U. S. 179.

Hot Springs Elec. Co. vs. Hot Springs, 70 Ark. 300, 67 S. W. 761.

Upon the faith of these contractual grants or licenses appellant has expended millions of dollars in the construction of a plant devoted to the public service. We submit that the City cannot legally say, "You have expended millions in the construction of your plant and distribution system but as you compete with our electric plant, you can no longer sell gas unless you take out another and different franchise or license upon terms which will put you out of business and give us the field."

In other words, the City is without authority to add to or subtract from the powers which the franchises license or convey. We submit that it follows that if these franchises carry a license to manufacture and sell gas, the City cannot require appellant to take out another or different license or permit to do those things on pain of fine or imprisonment. We are already licensed and do not have to submit to a re-licensing.

However, the City has done nothing less, for Section 3 of the ordinance prevents the conduct of our business unless we take out a new license to be known as an "Occupation License" and makes us "* * * guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on * * *" without the license, and by Section 24 imposes heavy penalties by fine and imprisonment for exercising our franchise rights without the new license.

We do not deny that ordinarily the grant of a franchise does not operate as a surrender by the sovereign of its right to tax. This, however, we think is totally different from saying that the City can and may require a new and different license of an already licensed occupation. In other words, the question is, can the City, in order to create the foundation of a tax, compel appellant to take out a license to do precisely what it is authorized to do by its franchises, without granting any new or additional privileges? Our answer is that it cannot, because the exaction of a new license is destructive of our franchise prerogatives and privileges. It follows that to permit the City to do what it is attempting to do will be to permit an impairment of the rights guaranteed appellant by Section 10 of Article I of the Constitution.

IV.

The Definition of Gross Income Contained in the Ordinance Is So Vague That the Amount of the Tax Sought to Be Imposed Cannot Be Ascertained With Reasonable Certainty.

This court has repeatedly declined to sustain laws which are vague and uncertain.

Connally vs. General Const. Co., 269 U. S. 385.

Champlin Refining Co. vs. Corporation Comm. of Okla., 286 U. S. 210.

International Harvester Corp. vs. Kentucky, 234 U. S. 216, 222.

Collins vs. Kentucky, 234 U. S. 634, 638.

United States vs. Cohen Grocery Co., 255 U. S. 81.

Small Company vs. American Sugar Refining Co., 267 U. S. 233.

Cline vs. Frink Dairy Co., 274 U. S. 445, 455.

Smith vs. Cahoon, 283 U. S. 553.

The rule is peculiarly applicable to taxing acts, which are to be strictly construed.

"'It is of the utmost importance, for the protection of the taxpayer, that tax laws should be certain; both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the taxpayer may have an opportunity without the expense of litigation, to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be

held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined, and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected.'"

State vs. Humble Pipe Line Co., 122 Texas, 373, 247 S. W. 1082, 1083.

The case of *State ex rel. Attorney General vs. West Side Street Ry. Co.*, 146 Mo. 145, 155, 47 S. W. 959, 961, seems directly in point.

"The courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers.

* * * * * *

"Upon what gross earnings is the percentage to be computed? A large capital must be invested in the machinery and appliances for conducting a street railway, aside from the tracks laid in the streets. The act seems to contemplate that the bid shall be a percentage only of the receipts derived from the use and occupation of the public property. How is the proper proportion of the gross earnings that should be attributed to the capital invested in the power stations, machinery, etc., to be ascertained? Shall it be by valuing the entire plant, and deducting therefrom

the proper valuation of the machinery, and apportioning the gross earnings according to these amounts? If so, how shall this value be fixed and by whom? The act furnishes no answer."

Counsel for the *Pacific Telephone & Telegraph Company,* whose case is set for hearing on the same day as this, show most convincingly in their brief that the term "gross income" as defined in Section 2 of the ordinance is wholly incomprehensible and consequently void. Most that they say is equally applicable to this appellant and for that reason we content ourselves by adopting their argument and quoting from the dissenting opinon of Judge Steinert (R. 57), which states the proposition quite clearly.

> "Further, I think that the definition of 'Gross Income,' in the ordinance, is so vague and uncertain as to render the ordinance inoperative and void. By its provisions the ordinance is penal. Fine and imprisonment are the penalties for noncompliance. The taxpayer is entitled to know definitely and certainly the amount of tax which he is required to pay and the method of its ascertainment, without the expense of litigation necessary to determine either. *Western Union Telegraph Co. vs. Texas,* 62 Tex. 630; *State ex rel. Crow, Attorney General, vs. West Side Street Ry. Co.,* 146 Mo. 155, 47 S. W. 959; *Standard Oil Co. vs. State,* 178 Ala. 400, 59 So. 667; *Winslett vs. Case-Fowler Lumber Co.,* 173 Ga. 539, 160 S. E. 364.
>
> "Looking at the terms of the ordinance, I do not see how the taxpayer could possibly determine the amount of tax to be paid by it, or the

method of its ascertainment, without resort to litigation. Different and vitally conflicting views will arise out of the interpretation of its language. Section 2 of the ordinance reads as follows, with reference to the definition of income:

"'Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emol [fol. 71] uments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.'

"Does the word 'value' as there used import 'cost price,' 'sale price,' or 'net profit' on the sale of tangible property or service? If any one of these was intended, it could easily have been expressed. Again, the word 'receipts' expressly excludes receipts or proceeds from the use or sale of real property. Appellant's equipment to the extent of millions of dollars is housed in, and in large part is permanently affixed to, buildings which are a part of the realty. Are the receipts from that source, *pro tanto,* to be deducted? Who shall say? How is anyone to know? It may confidently be assumed that the city will insist that no deductions are to be made in that respect. As confidently may it be assumed that the appellant will insist to the contrary. Many other questions are raised by the wording of this section, all of which lead to confusion in the attempt to inter-

pret them. The majority opinion says that the definition of 'Gross Income' in the present ordinance is substantially the same as that contained in the act of West Virginia, considered and sustained in the case of *Hope Natural Gas Co. vs. Hall, State Tax Commissioner,* 274 U. S. 284. I do not so read it. That act provided that persons engaging in certain businesses should pay a tax 'equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided) multiplied by the respective rates.' The language is not only entirely different, but upon its very face it shows that the tax is to be computed on the gross sales of the products. No such certainty or definiteness appears here. The rule by which the tax is to be measured should be definite and certain, and its definiteness and certainty should appear from its provisions [fol. 72] and not be the product of either litigation or compromise."

For the reasons stated in this brief and in the briefs of the Pacific Telephone & Telegraph Company and Puget Sound Power & Light Company, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted,

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Due and timely service of the within brief, by receipt of three (3) copies thereof, is hereby admitted this.....day of.....A. D. 19

.....

.....

Attorney.....for.....

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No. 359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

SEATTLE GAS COMPANY, a corporation,
Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

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THE ARGUS PRESS - SEATTLE

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SUBJECT INDEX

Page

Statement of the Case 1

Summary of Argument 5

Argument 7

First: **The Ordinance Applied to Appellant Does Not Transgress the Equal Protection Clause of the Fourteenth Amendment** 7

A. The Ordinance Taxes Both the Appellant and the City 7

B. If the Tax Upon the City is Ineffective, it is Due to Want of Power in that Respect. Such Want of Power Does not Deprive the City of Authority to Tax the Appellant. If Paramount Law Operates in Favor of a Portion of a Class (in This Case the City), the Fourteenth Amendment Does not Afford the Remainder of That Class (in This Case the Gas Company) a Refuge Against the Exercise of the Power to Tax 10

C. If the Tax upon the City is Ineffective, the City's Situation and the Inherent Differences Between Appellant's and the City's Utility are Sufficient to Sustain a Tax Upon the One and Not the Other 11

Second: **The Charge that the City, in Enforcing the Tax Against Appellant, Even Though the City Meets the Tax Upon Itself, Will Deny Appellant Equal Protection, Take Its Property Without Compensation, Deprive It of Its Property Without Due Process, Is Not Founded Upon Any Provision of the Ordinance or Any Fact or Circumstance in the Record or Elsewhere. This Charge is Supported Only By the Appellant's Expression of Fear and Apprehension, Which is of No Avail** 15

Page

A. Equity Does Not Allay Mere Fear and Apprehension 15

B. Conjectural Future Abuse of the Power of Taxation Under the Provisions of the Ordinance is no Denial of the Existence of the Power Exerted 17

Third: **The Requirement that Appellant Secure An Occupation License as a Condition to Its Continuance in the Gas Business in the City Does Not Impair Any Obligation of Its Franchise Contracts** 18

A. Such Requirement Being Merely a Mode of Collection of the Tax Does Not Unlawfully Interfere with the Contracts 18

B. Appellant's Franchises are not Licenses to Pursue its Occupation in the City nor Exemptions from License or Occupation Taxation 19

C. In any Event, the City Never Had, Nor Has It, Any Authority to Contract Away its Power of Taxation 21

Fourth: **The Definition of "Gross Income" as Applied to Appellant is Not Vague, Indefinite or Uncertain** 21

TABLE OF CASES CITED

Adams v. Greene, 182 Ky. 504, 206 S. W. 759 22

Adams v. Canutt, 66 Wash. 422, 119 Pac. 865 25

Alaska Fish Salt. & B.-P. Co. v. Smith, 255 U. S. 44, 65 L. ed. 489 18

Asia v. Seattle, 119 Wash. 674, 206 Pac. 366 9

Bradley v. City of Richmond, 227 U. S. 477, 57 L. ed. 603 17

Broad River Pr. Co. v. Query, 288 U. S. 178, 77 L. ed. 685 12

Chicago & N. W. Ry. Co. v. R. R. Com., 156 Wis. 47, 145 N. W. 216 26

Page

City of Joplin v. Southwest Mo. Lt. Co., 191 U. S. 150, 48 L. ed. 127 18

City of Lincoln v. Lincoln Gas & Elec. Co., 100 Neb. 182, 158 N. W. 962 18

City of Seattle v. P. S. P. & L. Co. (C. C. A.) 284 Fed. 659 ..... 8, 17

City of Seymour v. Texas Elec. Service Co. (C. C. A., Aug. 28, 1933) 68 Fed. (2d) 814 10

Clements v. Cook, 112 Wash. 217, 191 Pac. 874 25

Connecticut v. Massachusetts, 282 U. S. 660, 75 L. ed. 602 16

Crouch v. Ross, 83 Wash. 73, 145 Pac. 87 25

Des Moines v. Des Moines Gas Co. (C. C. A.) 264 Fed. 506 16

Fox v. Washington, 236 U. S. 273, 59 L. ed. 573 22

G. N. Ry. Co. v. Local Gt. Falls Lodge, etc., 288 Fed. 557 17

Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. ed. 237 18

Heisler v. Thomas Colliery Co., 274 Pa. 448, 118 A. 394, 24 A. L. R. 1215 14

Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825 18

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176 ..... 8, 18

Inc. Town of Mapleton v. Iowa Pub. Serv. Co., 209 Iowa 400, 223 N. W. 476, 68 A. L. R. 993 10

Inc. Town of Sibley v. Ocheyedan Elec. Co., 194 Iowa 950, 183 N. W. 560 10

Lehmann v. State Bd., 263 U. S. 394, 68 L. ed. 354 16

License Tax Cases, 5 Wall. 462, 18 L. ed. 497 18

Lincoln Gas & Elec. Co. v. City of Lincoln, 182 Fed. 926 18

Los Angeles Gas & Elec. Co. v. City of Los Angeles, 241 Fed. 912 15

Memphis Gas-Light Co. v. Taxing Dist. of Shelby County, 109 U. S. 398, 27 L. ed. 976 20

Page

Nebraska Telephone Co. v. City of Lincoln, 87 Neb. 59, 117 N. W. 284 20

New Orleans C. & L. R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121 20

New York v. Illinois, 274 U. S. 488, 71 L. ed. 1164 16

New York C. H. & R. Co. v. U. S., 212 U. S. 481 53 L. ed. 613 23

North Pacific Coast Freight Bureau v. Dept. of Pub. Wks., 156 Wash. 187, 286 Pac. 86 25

Pacific Coast Dairy v. Police Ct. of San Francisco, 214 Cal. 668, 8 Pac. (2d) 140, 80 A. L. R. 1217 22

Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650 ..... 20, 21

Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643 11

People ex rel. Metropolitan St. Ry. Co. v. State Bd., 199 U. S. 1, 50 L. ed. 65 20

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 718 21

Postal Tel.-Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871 19

P. S. P. & L. Co. v. City of Seattle (C. C. A.) 29 Fed. (2d) 254 ..... 8, 17

Raley & Bros. v. Richardson, 264 U. S. 157, 68 L. ed. 615 11

Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735 19

St. Louis v. United Rys. Co., 210 U. S. 266, 52 L. ed. 1054 20

St. Louis v. W. U. Tel. & Tel. Co., 148 U. S. 92, 37 L. ed. 380 20

San Jose v. San Jose & S. C. R. Co., 58 Cal. 475 20

Schoenfeld v. Seattle, 265 Fed. 726 13

Seattle Gas & Elec. Co. v. The City of Seattle (Franchise Perpetual) (Unreported) 4

South. Car. Pr. Co. v. So. Car. Tax Com., 52 Fed. (2d) 515 11

Southeastern Express Co. v. Miller, 264 U. S. 535, 68 L. ed. 836 22

Page

Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868 23
Springfield Gas & Elec. Co. v. City of Springfield, 257 U. S. 66, 66 L. ed. 131 13
Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197 23
State Bd. of Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248 13
State ex rel. Crow v. Westside St. Ry. Co., 146 Mo. 155, 47 S. W. 959 22
State ex rel. University of Utah v. Candland, 36 Utah 406, 104 Pac. 285 26
The Abby Dodge, 223 U. S. 166, 56 L. ed. 390 21
Toombs v. Citizens Bank, 281 U. S. 643, 74 L. ed. 1088 21
Twichell v. Seattle, 106 Wash. 32, 179 Pac. 127 9
Union Bank & Trust Co. v. Phelps, 288 U. S. 181, 77 L. ed. 687 11
U. S. v. Wurzbach, 280 U. S. 396, 74 L. ed. 508 23
Utah Pr. & Lt. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038 23
Whitney v. Spratt, 25 Wash. 62, 64 Pac. 919 25
Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419 17
Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275 19
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220.. 17

TEXT BOOKS:

Jones, Commentaries on Evidence (2d ed.) Vol. 1, §388, p. 677 25

STATUTES AND CONSTITUTION:

Washington Constitution, Art. VII, §4 21
Rem. Rev. Stat. of Wash., §9000-13 to 9000-24.. 9
" " " " " §9488 3
" " " " " §9488, *et seq.* 3
" " " " " §9953 4

	Page
Rem. Rev. Stat. of Wash., §§10363, 10364, 10365, 10390	5
" " " " " §§10363, 10365, 10448, 10444	23
Seattle City Charter, Art. IX, §17	9
" Ordinance No. 234 (Franchise)	4
" " No. 6968 "	4
Appendix A, Washington Dept. Pub. Wks. Order In Cause No. 6545	Following page 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

SEATTLE GAS COMPANY, a corporation, *Appellant*, vs. THE CITY OF SEATTLE, a municipal corporation, *Appellee.*	No. 359

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appeal in this case questions the correctness of a judgment of the Supreme Court of the State of Washington affirming a judgment and decree of dismissal by the trial court after sustaining a general demurrer to the appellant's amended complaint (R. 60, 33). Related cases are *Pacific Telephone & Telegraph Co. v. The City of Seatle, et al.*, and *Puget Sound Power & Light Co. v. The City of Seattle*, numbered, respectively, 364 and 344, October Term, 1933.

The instant case was disposed of by the Washington Court upon the opinions and decisions rendered in the related cases. Since the respective complaints in this and the *Power Company* cases are almost

identical, this cause will, in all likelihood, be controlled by the decision in the *Power Company* case. For this reason and for the reason that the appellant here reiterates and relies upon the arguments and authorities presented by the Power Company in its brief, we will not consume the time of this Court by repeating here all that appears in our brief already served and filed in the latter case. We content ourselves with a short resume' of the arguments and authorities there set forth, pointing out, however, any material differences.

Concisely, the case is made upon the following facts: The appellant is a domestic utility corporation, the appellee a municipal corporation of the State of Washington. They will, on occasion, be referred to herein as the Gas Company, or the Company, and the City, respectively.

In May, 1932, the City adopted its Ordinance No. 62662 (appearing in full in the Record at page 21) imposing a license or occupation tax upon persons, firms and corporations *and upon itself* for the privilege of engaging in the businesses affected. Among others, a tax was imposed upon those engaged in or carrying on the business of selling or furnishing gas and/or water for hire, measured by three per cent of the total gross income from such business in the City. The taxes commenced to accrue July 1, 1932, upon which date the appellant applied for the required license by the filing of a return of its gross income for the year 1931 and paid under protest (R. 17) the sum of $5,500.66 (R. 7), the first monthly installment of the tax. Thereafter it filed the com-

plaint herein (R. 1), seeking in its first cause of action the recovery of the amount so paid, and in its second cause of action an injunction against the collection of further monthly installments.

The City asserted claim to further monthly installments of the tax in like sums (R. 15).

In the exercise of authority first conferred upon it in 1890 (Rem. Rev. Stat., § 9488, *et seq.*), the City of Seattle on March 4, 1902, by popular vote, placed itself in the light and power business for the purpose of furnishing light and power to itself and its inhabitants (R. 4, 5). In launching upon this course, the City issued its general obligation bonds, of which the principal sum of $1,447,000 is still outstanding (R. 5). Since that time, the plant and system has been extended by the issuance and sale of utility revenue bonds, of which the principal sum approximating $32,852,000 is still outstanding. These bonds are obligations against only the gross revenues received from the sale of electric light and power, which revenues have been pledged to the payment of the bonds (R. 5, 6). Although the City possesses "full authority to regulate and control the use, distribution and price" of its electrical energy (Rem. Rev. Stat., § 9488), it does not appear whether the City realizes more from the sale of its product than sufficient to cover the said obligations and maintenance and operation.

The City utilizes electrical energy from its own plant and system for street lighting and other municipal and governmental purposes (R. 3) for which the City annually transfers from its tax supported

General Fund to its light utility revenue fund a sum determined upon to be the "true and full value" of the energy so used (Rem. Rev. Stat., § 9953). The amount so transferred in 1932 was $438,750.00 (R. 3).

In 1881, the City, by its Ordinance No. 234 (amending a prior ordinance, No. 39), granted to the appellant's predecessors the "Dexter Horton Franchise" authorizing the grantees therein named to erect and maintain gas works and to lay down pipes for the supply and distribution of illuminating gas in the City (R. 3). By a decision of the United States District Court in a cause entitled *"The Seattle Gas & Elec. Co. v. The City of Seattle, et al."*, rendered April 1, 1901, this franchise was declared perpetual. In 1901, the City granted a further franchise to the appellant's predecessors known as the "Malone Franchise", under Ordinance No. 6968, conferring upon the grantees the right, privilege and authority to erect and maintain gas works and to lay down, maintain and operate pipes in the streets, alleys, etc., of the City for the distribution and sale of gas (R. 4). Pursuant to these franchises, the appellant's predecessors and the appellant have continuously and without interruption sold gas to the inhabitants of the City and to others.

The City has no control over the rates charged for gas sold by the Company. These rates are fixed by the filing by the Company of its schedule of rates and charges with the Washington Department of Public Works (the State regulatory body), subject, however, to change by that body upon complaint and

after hearing (Rem. Rev. Stat., §§ 10363, 10364, 10365, 10390) (R. 2).

Insofar as gas and electrical energy may be used for the same or similar purposes, the City and the Gas Company are competitors in the same field within the City and solicit customers one from the other and from the open field (R. 2, 4). The record shows no coercion of customers by either. Because of this competition, the Company is required to sell more heat units at a given price than are supplied by the City by electrical energy for the same price (R. 3). The City has not increased its rates to enable it to pay into its General Fund the tax imposed upon its light utility (R. 10; Complaint XIX).

Before the tax in question became effective on July 1, 1932, the appellant filed with the Washington Department of Public Works a new schedule of rates for its gas which rates were increased by 3% for the purpose of shifting the tax to the consumer. Thereafter a hearing was had upon the new schedule, resulting in an (unreported) order by the Department, dated January 10, 1933, sustaining and confirming the same. A copy of said unreported order is printed as Appendix A to this brief.

SUMMARY OF ARGUMENT

First: **The Ordinance Applied to Appellant Does Not Transgress the Equal Protection Clause of the Fourteenth Amendment, Because—**

A. The Ordinance Taxes Both the Appellant and the City;

B. If the Tax Upon the City is Ineffective, it is

Due to Want of Power in that Respect. Such Want of Power Does Not Deprive the City of Authority to Tax the Appellant. If Paramount Law Operates in Favor of a Portion of a Class (In This Case the City), the Fourteenth Amendment Does not Afford the Remainder of that Class (In This Case the Gas Company) a Refuge Against the Exercise of the Power to Tax;

C. If the Tax Upon the City is Ineffective, the City's Situation and the Inherent Difference Between Appellant's and the City's Utility are Sufficient to Sustain a Tax Upon the One and Not the Other.

Second: **The Charge that the City, in Enforcing the Tax Against Appellant, Even Though the City Meets the Tax Upon Itself, Will Deny Appellant Equal Protection, Take Its Property Without Compensation, Deprive It of Its Property Without Due Process, Is Not Founded Upon Any Provision of the Ordinance or Any Fact or Circumstance in the Record or Elsewhere. This Charge Is Supported Only by the Appellant's Expression of Fear and Apprehension, Which Is of No Avail, for—**

A. Equity Does Not Allay Mere Fear and Apprehension;

B. Conjectural Future Abuse of the Power of Taxation Under the Provisions of the Ordinance is No Denial of the Existence of the Power Exerted.

Third: **The Requirement That Appellant Secure An Occupation License as a Condition to Its Continuance in the Gas Business in the City Does Not Impair Any Obligation of Its Franchise Contracts.**

A. Such Requirement Being Merely a Mode of Collection of the Tax Does not Unlawfully Interfere with the Contracts;

B. Appellant's Franchises are not Licenses to Pursue its Occupation in the City nor Exemptions from License or Occupation Taxation;

C. In any Event, the City Never Had, Nor has It, any Authority to Contract Away its Power of Taxation.

Fourth: **The Definition of "Gross Income" as Applied to Appellant Is Not Vague, Indefinite or Uncertain.**

ARGUMENT

First: **The Ordinance Applied to Appellant Does Not Transgress the Equal Protection Clause of the Fourteenth Amendment.**

A. The Ordinance Taxes Both the Appellant and the City.

The ordinance in Section 5, Subdivision (b), imposes an occupation tax upon every person engaged in or carrying on the business of selling or furnishing gas or water a tax equal to 3% of the gross income from such business in the City during his fiscal year next preceding the tax year, and in Subdivision (c)

upon every person engaged in or carrying on the business of selling or furnishing electric light and power a tax equal to 3% of the gross income from such business in the City during his fiscal year next preceding the tax year. By Section 6 the foregoing Subdivisions (b) and (c) are, so far as permitted by law, made applicable to the City of Seattle (R. 23, 24).

Notwithstanding the provisions of Section 6, the appellant alleges and maintains that the City is not obligated to pay the tax in respect to its light and power system, for the reason that the City, prior to the imposition of the tax and pursuant to state law, obligated its light utility revenues for the payment of the principal and interest of its utility revenue bonds. The Washington Supreme Court, as will appear from its opinion in the *Power Company* case appearing in the record at page 35, conceded the appellant's position in this respect solely for the purpose of argument. The decision is not determinative of the point made and, although the character of the lien of said utility revenue bonds has heretofore been in litigation, there has been no judicial determination of the precise status of the supposed lien. See *P. S. P. & L. Co. v. Seattle* (C. C. A.), 29 Fed. (2d) 254, 257; *City of Seattle v. P. S. P. & L. Co.* (C. C. A) 284 Fed. 659, 662 (Certiorari denied, *P. S. P. & L. Co. v. City of Seattle*, 262 U. S. 748, 67 L. ed. 1210). In the former case it was *expressly* held that the pledge of gross revenues to the payment of the bonds did not create a lien *in gross*.

The point attempted to be made that even if such

revenues could be subjected to the tax, no machinery is set up in the ordinance for that purpose is without foundation, since the City Charter (Art. IX, § 17) and the State budget law for cities (Rem. Rev. Stat., §§ 9000-13 to 9000-24, inc.) supply it. Under the terms of that law, the City Council is required annually, by ordinance, to set up a budget of its revenues and expenses for all departments, including utilities, for the ensuing year, and is required annually, by ordinance, after such budget is made up, to appropriate the items to the several departments which the administrative officers are authorized to expend in accordance therewith. All that remains to be done is the drawing and honoring of a warrant upon the utility fund in favor of the General Fund. The Court will presume that this administrative detail will be carried out.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176.

Any machinery set up in the ordinance would only be superfluous. A similar tax laid by the State upon the City would be paid in exactly the same way.

The tax imposed upon the City utilities, whether chargeable to capital or operation, may not be paid from the General Fund.

Asia v. Seattle, 119 Wash. 674, 206 Pac. 366;

Twichell v. Seattle, 106 Wash. 32, 179 Pac. 127.

In any event, such a transaction would be inane, meaningless, and a farce.

The tax upon the City utilities is as binding as

the tax upon the privately owned utilities, for when the City Council exercises its power to tax it acts governmentally as a representative of the sovereign. It has been so held in respect of the fixing of rates applicable to both private utilities and City-owned utilities under the police power.

City of Seymour v. Texas Electric Service Co. (C. C. A., Aug. 28, 1933) 68 Fed. (2d) 814, 817;

Inc. Town of Sibley v. Ocheyedan Elec. Co., 194 Iowa, 950, 187 N. W. 560;

Incorporated Town of Mapleton v. Iowa Pub. Serv. Co., 209 Iowa 400, 228 N. W. 476, 68 A. L. R. 993;

B. If the Tax Upon the City is Ineffective, it is Due to Want of Power in that Respect. Such Want of Power Does not Deprive the City of Authority to Tax the Appellant. If Paramount Law Operates in Favor of a Portion of a Class (In This Case the City) the Fourteenth Amendment Does Not Afford the Remainder of that Class (In This Case the Gas Company) a Refuge Against the Exercise of the Power to Tax.

If the provisions of the ordinance taxing the City utility are inoperative, it is because of constitutional inhibitions against impairment of the obligation of contracts with the bondholders; not because of failure to set forth the *modus operandi* in the ordinance. This being so, the tax fails because of the command of a paramount law. The City cannot be justly charged with discrimination against the appellant in

favor of its own enterprise. Deference of local authorities to paramount law with respect to part of a class, is held not to work a discrimination against the remainder of the class not harbored by such law.

Raley & Bros. v. Richardson, 264 U. S. 157, 68 L. ed. 615, 616;

Union Bank & Trust Co. v. Phelps, 288 U. S. 181, 187, 77 L. ed. 687, 690;

Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643.

C. If the Tax Upon the City is Ineffective, the City's Situation and the Inherent Differences Between Appellant's and the City's Utility are Sufficient to Sustain a Tax Upon the One and Not the Other.

If a classification results in the case at bar, placing the appellant in one class, subject to the tax, and the City in another class, free of the tax, that fact and other fundamental differences between the two afford a proper basis for the classification. That the differences between private electric utilities and private gas companies afford ample basis for difference in treatment in taxation consonant with the constitutional requirement of equal protection, was expressly held in *South Carolina Power Co. v. South Carolina Tax Commission*, 52 Fed. (2d) 515. There, a statutory three judge court sustained an act of the state of South Carolina imposing an excise tax upon the generation of electricity by hydroelectric and steam power, expressly exempting therefrom the generation of electricity by municipally owned plants, and exempting gas companies by failure of mention.

Judge Parker, writing the opinion for the court, said:

> "The act before us cannot be said to be palpably arbitrary in that it does not tax the generation of electricity by the use of combustion engines, nor because it does not tax persons furnishing gas to the public for light, heat and power. *The business of producing and selling gas is so fundamentally different from the generation of electric power, that to point out the differences which might furnish a basis for the taxation of one and not the other is clearly unnecessary.* * * *
>
> "So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. *Irvine v. Town of Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 368. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the Fourteenth Amendment. See *Village of Hardwick v. Wolcott*, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note."

Denial of an interlocutory injunction was affirmed upon appeal to this Court and reported in 286 U. S. 525, 76 L. ed. 1268. Upon appeal on the merits, this Court affirmed the trial court in a decision reported as *Broad River Power Co. v. Query*, 288 U. S. 178,

77 L. ed. 685. Apparently the appellants there were satisfied with the decision of the three judge court, for it does not appear that they urged the exemption either of municipal utilities or gas companies as an unlawful discrimination.

It was largely upon the authority of the aforementioned case that the Washington Supreme Court approved the instant tax upon the appellant Gas Company, assuming no similar tax upon the City electric plant. The decision of the Washington court also finds support in *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U. S. 66, 66 L. ed. 131; *Schoenfeld v. Seattle*, 265 Fed. 726; *State Bd. of Tax Comrs. v. Jackson*, 283 U. S. 527, 75 L. ed. 1248; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 L. ed. 237, and many other cases decided by this Court.

In opposition, the appellant relies upon the decision in *Lincoln Gas & Elec. Co. v. City of Lincoln* (1909) 182 Fed. 926, 929, and *City of Lincoln v. Lincoln Gas & Elec. Light Co.*, 100 Neb. 182, 158 N. W. 962.

In the case first cited, decided by the local Circuit (now District) Court, sitting in Nebraska, in a suit to restrain the enforcement of two ordinances, one fixing rates for gas, the other imposing an excise tax of two and one-half per cent upon the gross receipts of the company, *it was held that the tax was invalid as a violation of the constitution of the state of Nebraska, requiring occupation taxes to be equal and uniform* upon persons and property. The

Fourteenth Amendment of the Federal Constitution was not mentioned.

In the second case cited, decided by the Supreme Court of Nebraska in 1916, in an action by the City to collect the excise imposed by the ordinance theretofore considered by the local Federal Court, the Nebraska court held the ordinance void as a denial of the equal protection of the laws, following the decision of the Federal Court. The opinion is short and arguments supporting it unconvincing. The dissenting opinion filed by Justice Letton is, on the other hand, well reasoned and thoroughly convincing, and supports his position upon arguments and analogies closely similar to those in *Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 118 A. 394, 24 A. L. R. 1215.

Conceding, for the sake of argument, that there is insufficient distinction between a private gas and a private electric company to sustain a tax upon the one and not the other, yet in the case at bar there are other and obviously greater distinctions between the municipal electric business and the private gas business.

Second: **The Charge That the City, in Enforcing the Tax Against Appellant, Even Though the City Meets the Tax Upon Itself, Will Deny Appellant Equal Protection, Take Its Property Without Compensation, Deprive It of Its Property Without Due Process, Is Not Founded Upon Any Provision of the Ordinance or Any Fact or Circumstance in the Record or Elsewhere. This Charge Is Supported Only by the Appellant's Expression of Fear and Apprehension, Which Is of No Avail.**

A. Equity Does Not Allay Mere Fear and Apprehension.

It is asserted in appellant's brief at page 19 that the City "is attempting, through the process of taxation, to destroy appellant's utility in order to foster its own. This, we submit, cannot be done." To this proposition it cites *Los Angeles Gas & Elec. Co. v. City of Los Angeles*, 241 Fed. 912, 918 (affirmed, 251 U. S. 32, 64 L. ed. 121). That case is, however, in no way apposite here. It clearly appears from the decisions that the ordinance there involved was a bold attempt by the city of Los Angeles, in the purported exercise of its police power, to cause the relocation in the streets of the facilities of a private electric company so that the facilities of the City's electric system might be installed. It was clearly pointed out by both Courts that if a real necessity existed, based upon preservation or protection of public peace, health or safety, the ordinance might have been sustainable, even though incidentally work-

ing to the advantage of the City's enterprise at the expense of the Company.

In the case at bar there is not the slightest suggestion upon the face of the ordinance or in any fact pleaded in the complaint from which this or any other Court could draw an inference of bad faith. To the contrary, the ordinance bespeaks the City's good faith, since it imposes a tax not only upon the City's light business, but also upon its water business as well as upon a number of private businesses.

The appellant's attempt to raise an inference or implication of bad faith springs only from its expressed fear and apprehension and from prophecy. It foretells that even though the City transfers utility revenues into the General Fund in payment of its utility tax, the City will nevertheless through exorbitant allowances for street and municipal lighting reimburse its utility fund out of its General Fund. Thus by circumlocution the utility fund will be relieved, while the collection of the tax from appellant will eventually wipe out its business. But neither accusations of bad faith nor fear of possible future events, without the allegation of a substantial supporting fact, will cause equity to act.

Lehmann v. State Board, 263 U. S. 394, 68 L. ed. 354;

Connecticut v. Massachusetts, 282 U. S. 660, 75 L. ed. 602;

New York v. Illinois, 274 U. S. 488, 71 L. ed. 1164;

Des Moines v. Des Moines Gas Co. (C. C. A.) 264 Fed. 506;

G. N. Ry. Co. v. Local Great Falls Lodge, etc., 283 Fed. 557;

P. S. P. & L. Co. v. City of Seattle (C. C. A.) 29 Fed. (2d) 254, 257;

City of Seattle v. P. S. P. & L. Co. (C. C. A.) 284 Fed. 659, 662, (Certiorari denied, 262 U. S. 743, 67 L. ed. 1210).

Should the City in future so rebate to its utility, at the same time insisting upon the tax from appellant, to its injury, the strong arm of Federal equity may be enlisted.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220;

Bradley v. City of Richmond, 227 U. S. 477, 483, 57 L. ed. 603, 606.

B. Conjectural Future Abuse of the Power of Taxation Under the Provisions of the Ordinance is No Denial of the Existence of the Power Exerted.

It is strongly urged by the appellant that under the circumstances presented by this record, the Court should invoke the Fourteenth Amendment to deny the City power to impose a privilege tax upon the appellant by this or any other ordinance so long as the City is a so-called competitor. The reason assigned is that the City *may abuse* the power. However, it is hardly necessary to cite authority to the proposition that the *possibility* of the abuse of a power is no denial of the existence thereof.

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 376, 27 L. ed. 419, 424;

Alaska Fish Salt. & B.-P. Co. v. Smith, 255 U. S. 44, 48, 49, 65 L. ed. 489, 495.

Again, we should not lose sight of the fact that "The limitation contended for is upon a governmental agency, and the restraints upon that must not be readily implied." *City of Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 48 L. ed. 127.

Besides, the Court will presume that the City's public officers will act fairly and impartially. *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 279, 53 L. ed. 176, 185.

***Third:* The Requirement That Appellant Secure An Occupation License as a Condition to Its Continuance in the Gas Business in the City Does Not Impair Any Obligation of Its Franchise Contracts.**

A. Such Requirement Being Merely a Mode of Collection of the Tax Does Not Unlawfully Interfere with the Contracts.

The required license is merely a convenient mode of collecting the tax. It is in no sense exacted in the exercise of the police power. The license confers upon the holder no authority whatever except in respect of the taxing act. The penalty imposed is not for the failure to secure or have the license for its own sake or for the sake of any authority conferred, but for the purpose of facilitating collection. The license is a mere receipt.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497;

Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825;

Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735;

Postal Tel.-Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871;

Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 280.

The license requirement does not, therefore, deprive the appellant of any privilege it may have under its franchises.

B. Appellant's Franchises are not Licenses to Pursue its Occupation in the City Nor Exemptions from License or Occupation Taxation.

The appellant contends that the exaction of the license impairs or destroys its claimed licenses to pursue its business granted in its franchises.

In the first place, its franchises are not licenses in the sense contended for. Only the sovereign state may grant a franchise *to do*, the City only a secondary franchise for street occupancy. If appellant could conduct its business entirely upon private property, no franchise from the City would be necessary. Wireless communication companies are not, so far as we know, required to secure franchises from a city for the privilege of setting up and operating stations entirely upon private property. The franchises in question are what may be classed as secondary franchises granting privileges only in the streets, alleys and public places of the City. They are not to be confused with police licenses conferring privileges to pursue or carry on occupations or businesses, nor

with *nominal* licenses exacted in the collection of privilege taxes.

St. Louis v. W. U. Tel. & Tel. Co., 148 U. S. 92, 37 L. ed. 380;

Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650.

In *Memphis Gas Light Co. v. Taxing Dist. of Shelby County*, 109 U. S. 398, 27 L. ed. 976, the identical question here raised was decided in favor of the power to exact a license tax, notwithstanding the possession by the complainant of a so-called operating franchise.

See also *People ex rel. Metropolitan St. Ry. Co. v. State Bd.*, 199 U. S. 1, 50 L. ed. 65.

Moreover, the appellant's franchises will be examined in vain for any *express* provision exempting it from taxation of any kind. The appellant has failed to point out any such exemption. Any doubt regarding the existence of exemption from taxation is fatal to the claim therefor.

St. Louis v. United Rys. Co., 210 U. S. 266, 52 L. ed. 1054;

New Orleans C. & L. R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121;

People ex rel. Metropolitan St. Ry. Co. v. State Bd., 199 U. S. 1, 50 L. ed. 65;

Nebraska Telephone Co. v. City of Lincoln, 82 Neb. 59, 117 N. W. 284.

In *San Jose v. San Jose & S. C. R. Co.*, 53 Cal. 475, it was held that the imposition of a city license tax was not an interference with the franchise granted

by the sovereign State of California to construct and operate a railway.

C. In Any Event, the City Never Had, Nor Has It, Any Authority to Contract Away Its Power of Taxation.

The appellant makes no claim that the City ever had authority to contract away its power of taxation. Such a claim would be baseless. The Washington Court, in *Pacific Tel. & Tel. Co. v. Everett*, 97 Wash. 259, 269, stated that the City of Everett could not surrender its general taxing power in view of the State Constitution, Art. VII, § 4, providing:

> "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."

Fourth: **The Definition of "Gross Income" as Applied to Appellant Is Not Vague, Indefinite or Uncertain.**

The Washington Court, presumably deeming the definition sufficient, approved it without interpretation or construction. And so it comes here for construction, if that be found to be necessary. This Court will, if possible, so construe it as to render it constitutional.

> *Toombs v. Citizens Bank*, 281 U. S. 643, 647, 74 L. ed. 1088, 1090;
>
> *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 58 L. ed. 713, 720;
>
> *The Abby Dodge*, 223 U. S. 166, 175, 56 L. ed. 390, 393;

Fox v. Washington, 236 U. S. 273, 277, 59 L. ed. 573, 575.

A statute cannot be held void for uncertainty if any practical or sensible or reasonable construction can be given it.

State ex rel. Crow v. Westside St. Ry. Co., 146 Mo. 155, 47 S. W. 959;

Adams v. Green, 182 Ky. 504, 206 S. W. 759;

Pacific Coast Dairy v. Police Court of San Francisco, 214 Cal. 668, 8 Pac. (2d) 140, 80 A. L. R. 1217.

Courts may resolve to clearness a vague statute imposing a tax.

Southeastern Express Co. v. Miller, 264 U. S. 535, 539, 68 L. ed. 836, 839.

The appellant fails to point to any particular in which the definition, as applied to it, is vague, indefinite or uncertain. Vicarious criticism is made by reference to and adoption of the criticisms and arguments made by the Pacific Telephone and Telegraph Company, appellant in related case No. 364, and by a quotation from the dissenting opinion of Justice Steinert of the Washington Supreme Court (R. 42).

The Gas Company's situation is not different from the situation of either the Telephone or the Power Company. The following abridgment of the definition serves to cover them all:

> "The value proceeding or accruing from the sale of tangible property * * * without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, in-

terest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

The appellant sells property, gas. The value which accrues to it from the sale thereof is the price or compensation received from the consumer. Its price is fixed according to law under the same statutory provisions which control its present colleague, the Power Company (Rem. Rev. Stat., §§ 10363, 10365, 10443, 10444).

The value accruing to it cannot possibly be its net proceeds, particularly in view of the last portion of the definition expressly disallowing deductions for costs or expenses of any kind whatever. Since that portion of the definition omitted from the foregoing abridgment is of no concern to the appellant, it may not be heard to complain thereof.

U. S. v. Wurzbach, 280 U. S. 396, 74 L. ed. 508;

Utah P. & L. Co. v. Pfost, 286 U. S. 165, 186, 76 L. ed. 1038, 1049;

New York C. H. R. Co. v. U. S., 212 U. S. 481, 53 L. ed. 613;

Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868;

Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197.

That part of the definition reading as follows: "including rentals, royalties, fees or other emoluments, however designated," is also sufficiently adaptable to include the gross receipts from appellant's business.

Any claim that may be made that deduction of *receipts from the use of real property* from receipts for gas sold lacks foundation, since there is nothing in the record to show that receipts are acquired from that source. Receipts from gas sales are paid and received as receipts or proceeds from the sale *of personal property*. It does not appear from the complaint whether the appellant owns or leases the real property used in the conduct of its business. If it is lessee of such property, the rent paid therefor is chargeable to *operation* and as an operating cost is not deductible from receipts, as we have seen. If it owns the property, that fact does not transform the reasonable value of its use, which is the equivalent of rent, from an operating cost to a receipt from the use of realty.

The appellant alleges that in July, 1932, it filed its return showing its gross income for the year 1931 and paid the first monthly installment of its tax, computed on such income, in the sum of $5,500.66. There is no allegation that the City disputed the amount of income reported but, on the contrary, the City asserted claim to installments for subsequent months in like amount (R. 15).

That the appellant has had no difficulty in applying the definition in computing the amount of its tax is further evidenced by the fact that it applied for and was granted an increase in its rates for gas equal to 3% of the amount formerly charged. The order of the Washington Department of Public Works, together with the reasons therefor, appears as an appendix to this brief. It may be objected that in referring

to this order we are going outside the record in this case. We are satisfied, however, that upon the authority of the following cases the Washington Court would take judicial notice of formal orders of the State's utility regulatory body.

Whitney v. Spratt, 25 Wash. 62, 64 Pac. 919, in which judicial notice was taken of the rules and decisions of the United States Land Department;

Adams v. Canutt, 66 Wash. 422, 119 Pac. 865, in which judicial notice was taken of the rules and practice of the United States Interior Department;

Crouch v. Ross, 83 Wash. 73, 145 Pac. 87, in which judicial notice was taken of the practice of the State Commissioner of Public Lands to subpoena witnesses and administer oaths;

Clements v. Cook, 112 Wash. 217, 191 Pac. 874, in which judicial notice was taken of the prices fixed for timber by the United States War Industry Board during the time the Federal Government had control of the logging industry in the State;

North Pacific Coast Freight Bureau v. Dept. of Pub. Wks., 156 Wash. 137, 286 Pac. 86, in which, in reviewing an order of the Department of Public Works, judicial notice was taken of a rule of the department;

Jones' Commentaries on Evidence (2d ed.) Vol. 1, § 388, p. 677.

Furthermore, counsel for appellant and their colleagues, when these cases were before the Washington Supreme Court, invited that court to take judicial notice of the annual reports of the regulatory body without complaint or objection from the appellee.

This invitation was made upon authority of the following:

Chicago & N. W. Ry. Co. v. Railroad Com., 156 Wis. 47, 145 N. W. 216, 220;

State ex rel. University of Utah v. Candland, 36 Utah 406, 104 Pac. 285.

For the reasons advanced in this brief and in the briefs of appellee filed in the related cases before mentioned, the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

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Assistant,
C. V. HOARD,
Counsel for Appellee.

515 County-City Building,
Seattle, Washington.
December, 1933.

APPENDIX A

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON

SEATTLE GAS COMPANY,	*Respondent.*	CAUSE No. 6545
VS.		
CITY OF SEATTLE,	*Petitioner,*	

FINDINGS OF FACT and ORDER

This matter came on regularly for hearing on the 15th day of August, 1932, pursuant to notice duly given before Fred K. Baker, Director, Frank Purse, Supervisor of Public Utilities, and B. R. Lewis, Supervisor of Transportation; the Department being represented by John C. Hurspool, Assistant Attorney General.

The parties were represented as follows:

City of Seattle

By J. Ambler Newton and Walter L. Baumgartner, assistant corporation counsel.

Seattle Gas Company

By C. K. Poe, attorney at law, Seattle, Washington.

Witnesses were sworn and examined, documentary evidence was introduced and the Department being fully advised in the premises makes and enters the following

FINDINGS OF FACT

The city of Seattle levied an excise tax, effective

~~and a return on the investment. Reduced to a com-~~

July 1, 1932, of three per cent of the gross operating revenues of certain public utilities, including the Seattle Gas Company, respondent herein. Respondent then filed its Schedule XI, effective six days before the effective date of the ordinance and increasing its gross billings three per cent. The complaint of the city raises the issue squarely—shall the company be permitted to increase its rates sufficiently to cover the tax or shall it be required to absorb the tax out of its earnings under the present rates.

The Department is of the opinion and finds that the rates named in Schedule XI are not unfair, unjust and more than sufficient. The record in this case consists in the main of the testimony and exhibits of Mr. Pollard, manager of respondent, Mr. Gray, special engineer for the Department, and Messrs. Carey and Harlan, engineers for the City. The records of former hearings were made a part of the record herein by stipulation for such uses as the parties might desire. Mr. Pollard's exhibit shows that the average value of the plant plus working capital on June 30, 1932, was $15,827,289 and that during the first six months of 1932 the earnings available for depreciation and a return on the investment were 5.13 per cent. Mr. Gray shows that the value on the same date was $11,761,820 and the return on the investment for the six month period, after charging off depreciation, was 5.73 per cent. Carey and Harlan show that the value on that date was $12,410,801 and that in the six month period the company earned 7.12 per cent for depreciation and a return on the investment. Reduced to a con-

parable form by deducting 2.18 per cent for an annual depreciation charge, the rates of return are:

Mr. Pollard ..... 2.95 per cent
Mr. Gray ..... 5.78 per cent
Carey and Harlan..... 4.94 per cent

When it is remembered that all of these men considered 2.18 per cent the minimum rate for depreciation, their testimony certainly cannot be used to support a finding that the company should pay the tax out of its present earnings.

The differences between Mr. Pollard on the one hand and Mr. Gray and Carey and Harlan on the other hand, are mainly the result of certain large deductions made by the latter. Each arrived at the present value by bringing down to date the value fixed in 1914 by adding the additions and betterments. All agree that the additions to June 30, 1932, amount to about $6,000,000. Mr. Pollard arrived at his present value by adding this $6,000,000 to the figure found by the Commission in its 1914 order. Messrs. Gray and Carey and Harlan insisted that the Commission erroneously included in its 1914 value the sum of $1,594,096 for development cost and a sum in excess of $900,000 for paving over mains. They also deducted about $250,000 for property no longer used in the public service. Carey and Harlan also excluded the entire management fee as a charge to operating expenses.

We are of the opinion that it is unnecessary for us to make the customary valuation findings. The record conclusively shows that after the excise tax is paid the return to the company on the lowest value

suggested will not be more than reasonable. This is a fortunate circumstance for the Department, for otherwise a new valuation study would have to be made. The three engineering studies submitted all begin with the 1914 valuation. We think that the testimony of Mr. Gray and Carey and Harlan throws serious doubt on the correctness of the order and makes it inadvisable to use that figure any longer. However, we do not believe that we have authority to review and correct that order. We agree with the City that rate making is a continuing function and that the errors in the 1914 order are not binding on us, but we do not agree that we can first impeach that order and then use it as a foundation on which to build present value. When it becomes necessary to fix a rate base for the company the proper and regular procedure is to make a new valuation, as was done in the recent case involving the Grays Harbor Railway & Light Company.

We cannot agree with the contention of the City that the 1914 order contains palpable errors within the meaning of *Pacific Power & Light Co. v. Department of Public Works*, 143 Wash. 67. The allowance for development cost is palpable, but is it erroneous? It is clear that the Commission made that allowance in lieu of an allowance for "going value". It was conceded by all the engineers and is established by many decisions of the United States Supreme Court that an allowance for going value must be made. The fact that the Commission computed it in the wrong manner and called it the wrong name does not seem to us to be a palpable error. Whether the allowance

is excessive for going value cannot be determined by reading the order, but necessitates reviewing the testimony. The palpability of the charge for paving over mains is more dubious still. The Commission did not say that it was making any such allowance. To prove that it did so, recourse must be had to the testimony and exhibits offered at the hearing. When it is remembered that this 1914 order has been before several subsequent Commissions and before the Superior Court of Thurston County and the State Supreme Court on two occasions, it is rather startling to suggest that it contains two palpable errors, aggregating more than two and a half million dollars.

Before concluding, we desire to advert to the management fee. Under the existing contract, the Seattle Gas Company pays about $7,000 a month to the holding company in Chicago. Although Mr. Pollard made a very able exposition of the value of the services to the local company, we find ourselves unable to believe that a charge of this size is necessary or legitimate. The company has a very able staff in Seattle that seems competent to handle any problem that may arise. We may note that its local staff handled the present proceedings, apparently without aid from Chicago. This management fee does not and will not affect the customers so long as the company is earning less than a reasonable return, after excluding the fee as a charge. It does, however, affect the financial stability of the company and the value of its securities. If this matter should come again before this Department, the charge will be disallowed unless the company proves in detail the amount and char-

acter of the services, the necessity of the services and the cost thereof to the holding company.

Figures have been suggested to us showing that the company, after charging all costs including the excise tax and depreciation, will under its present rates earn in 1932, 7.025 per cent on the depreciated value of its property and 5.953 per cent on the undepreciated value. Higher rates of return are shown for the prospective normal years after prosperity has returned. Figures based on a normal year (meaning a year like 1928 or 1929) are misleading. No one present at the hearing is qualified to say when such prosperity will return. Rates are made to fit existing conditions and not to fit conditions that may never come.

The computation of the return on the present depreciated value of the property is futile and will serve only to incite public animosity. Our Supreme Court has declared in several cases that the company is entitled to earn a reasonable return on the money prudently invested in the property. Moreover, the depreciated value suggested is not to be found in the testimony or exhibits in this case; it was computed from the records of earlier cases and the method used to determine the accrued depreciation has been condemned repeatedly by the courts. Furthermore, the depreciated value suggested contains no allowance for "going value." We understand that such an allowance must be made if the depreciated present value is used as the rate base.

The undepreciated value suggested is not far from the figure suggested by Carey and Harlan. The

figure used for working capital and supplies is the lowest figure shown in the record. The depreciation allowance is computed on the sinking fund basis, which results in a lower figure than the straight line method. Moreover, the figure used was regarded as too low by all of the engineers testifying in the case. Operating revenues were assumed to be almost as large for the last half of 1932 as for the first half, although the financial pages of the newspapers show that every utility is losing customers. A minimum allowance is made for operating expenses; the entire management fee is disallowed; the loss on merchandising and a large part of the new business expense is disallowed, although it clearly appears that these activities resulted in large increases in the sale of gas; all this in the face of the fact that the company can no longer sell its residuals, which formerly resulted in a large credit to operating expenses. The allowance for taxes, not including the excise tax, is less than the actual taxes paid last year, although a state levy on utility revenues will probably follow as an aftermath of the 40-mill law. Further, the newspapers inform us that the City of Seattle since the hearing has imposed a further tax or fee on the gas company, measured by the number of connections. The allowance for uncollectible revenues is fixed at $29,160, although the Manager of the company testified that the company had recently decided to set aside 2 per cent of the gross for that purpose. It is a matter of common knowledge that unemployment is increasing and that more and more people are exhausting their savings and their ability to pay.

There is no need to discuss the proposed findings further. After all deductions are made they show that the company at its present rates will earn in 1932 on the undepreciated value of the property, 5.95 per cent. We are not advised of any court decision holding that such a rate of return is reasonable and sufficient.

WHEREFORE IT IS ORDERED that the petition of the City of Seattle herein and these proceedings be dismissed.

IT IS FURTHER ORDERED that all money deposited and impounded in the Peoples Bank and Trust Company of Seattle in accordance with the order of this Department herein, dated June 23, 1932, be released and said bank is hereby authorized to pay over said money at the order of the Seattle Gas Company.

DATED at Olympia, Washington, January 10, 1933.

DEPARTMENT OF PUBLIC WORKS.
By FRED K. BAKER,
Director.
By B. R. LEWIS,
Supervisor of Transportation.